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## Libertarian Administrative Law

Cass R. Sunstein\* and Adrian Vermeule\*\*

### Abstract

*In recent years, several judges on the nation's most important regulatory court -- the United States Court of Appeals for the District of Columbia Circuit -- have given birth to libertarian administrative law, in the form of a series of judge-made doctrines that are designed to protect private ordering from national regulatory intrusion. These doctrines involve nondelegation principles, protection of commercial speech, procedures governing interpretive rules, arbitrariness review, standing, and reviewability. Libertarian administrative law can be seen as a second-best option for those who believe, as some of the relevant judges openly argue, that the New Deal and the modern regulatory state suffer from basic constitutional infirmities. Taken as a whole, libertarian administrative law parallels the kind of progressive administrative law that the same court created in the 1970s, and that the Supreme Court unanimously rejected in the Vermont Yankee case. It should meet a similar fate. Two cases to be decided next Term provide an opportunity for the Court to repudiate libertarian administrative law.*

### I. Introduction

In the years before Vermont Yankee<sup>1</sup> was decided, the District of Columbia Circuit -- acting through a determined subset of its judges -- made a concerted effort to push administrative law in a direction that the Supreme Court was ultimately unwilling to go.<sup>2</sup> These judges believed that administrative law should show special solicitude for environmental interests, consumer interests, and other interests that the judges thought to be under-represented in the political process, because the costs and dynamics of political organization yielded relatively greater authority to industry and producers. Perhaps influenced by prominent work in social science,

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<sup>1</sup> Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

<sup>2</sup> A good discussion is Antonin Scalia, Vermont Yankee, the DC Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345.

which seemed to support the claim of under-representation,<sup>3</sup> the judges devised a distinctly progressive approach to administrative law, featuring, among other things, hybrid procedural requirements. These innovations required agencies to offer more procedures than the Administrative Procedure Act (APA) mandated,<sup>4</sup> at least when special solicitude for environmental or other interests was necessary (in the judges' view).

To obtain a flavor of the period, consider these remarkable words: "Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.' But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role."<sup>5</sup> The court affirmed that role in another case announcing that "[w]e stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts,"<sup>6</sup> in which judges would be "increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty."<sup>7</sup> The court proclaimed that such "interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding."<sup>8</sup>

It was not coincidental that such words appeared in an opinion vindicating the claims of a prominent environmental organization, which sought to ensure implementation of regulatory requirements.<sup>9</sup> In a sense, the court's approach could be seen as an effort to apply its own version of the famous footnote 4 of the *Carolene Products* case, suggesting that the judicial role should be heightened when politically vulnerable groups were at risk.<sup>10</sup> The approach was a clear administrative law analogue to constitutional developments, associated above all with the Warren Court, that had an unmistakably progressive "tilt." We might even see the court of appeals in the relevant period as a kind of junior-varsity Warren Court, enlisting principles of administrative law to protect preferred rights ("fundamental personal interests") and to correct for democratic failures ("Therein lies the judicial role").

The implicit political science behind the court's agenda, emphasizing the alleged organizational problems of dispersed interests, was not implausible, and it had some conceptual

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<sup>3</sup> See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); BURTON A. WEISBROD, JOEL F. HANDLER & NEIL K. KOMESAR, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978). For related ideas on the constitutional side, see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

<sup>4</sup> For a catalogue, see Scalia, *supra* note 2, at 348-52.

<sup>5</sup> *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

<sup>6</sup> *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

<sup>7</sup> *Id.* at 598.

<sup>8</sup> *Id.*

<sup>9</sup> See *Id.* at 588.

<sup>10</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). To be sure, the famous footnote referred to "discrete and insular minorities," *Id.*, rather than diffuse minorities, but the democracy-reinforcing project is the same. See Ackerman, *supra* note 3.

and empirical foundations.<sup>11</sup> But it was far from self-evidently correct,<sup>12</sup> and even if correct, it did not obviously justify stringent judicial oversight.<sup>13</sup> The more immediate problem with the lower court's agenda, however, was that it was inconsistent with the governing law. "Fundamental personal interests in life, health, and liberty" may or may not deserve some kind of priority over "economic interests," but it is a separate question whether judges may legitimately enforce any such priority. The APA did not permit judges to offer greater procedural protection to their preferred types of interests, barring a constitutional due process problem. The Supreme Court found it necessary to reassert control over administrative law, rebuking the lower court for its presumption -- most dramatically in Vermont Yankee itself, which held that hybrid procedural requirements were lawless impositions with no basis in the APA or other recognized legal sources.<sup>14</sup> That holding was accompanied by a highly unusual passage, suggesting that the Court was aware that a more general principle was at stake:

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function.<sup>15</sup>

Since then, it has been observed that some lower-court doctrines have seemed to conflict with Vermont Yankee, and perhaps with the more general principle as well, and scholars have periodically called for a "Vermont Yankee II," or III or IV,<sup>16</sup> to correct lower-court holdings that seem to defy the Court with respect to discrete issues of administrative law, above all by imposing procedural requirements that lack standard legal justifications.

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<sup>11</sup> See OLSON, *supra* note 3; WEISBROD ET AL., *supra* note 3.

<sup>12</sup> See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986) (suggesting concern about agency tendency toward overregulation and arguing that through OMB review, the President can implement "a broad view of the nation's economic interest"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2264 (2001).

<sup>13</sup> See Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 YALE L.J. 31 (1991). For a response, see Thomas Merrill, *Does Public Choice Theory Justify Judicial Activism After All?* 21 HARV. J.L. & PUB. POL'Y 219 (1997).

<sup>14</sup> Vermont Yankee, 435 U.S. at 524 (the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. . . . [R]eviewing courts are generally not free to impose [additional procedural requirements]."); see also, e.g., *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983) (sternly warning against excessively stringent arbitrariness review in the same context, nuclear power regulation, at issue in Vermont Yankee).

<sup>15</sup> *Id.* at 557-58.

<sup>16</sup> See Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981); Richard J. Pierce, Jr., *Waiting for Vermont Yankee II*, 57 ADMIN. L. REV. 669 (2005); Jack Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, (2007).

Yet the Court has not roused itself to police the D.C. Circuit in any systematic way, apart from ad hoc and relatively small-bore interventions, not generally involving large-scale administrative law doctrines.<sup>17</sup> From the Court's point of view, this is a plausible allocation of resources, corresponding to a similar lack of intervention during the pre-Vermont Yankee period<sup>18</sup> (notwithstanding the DC Circuit's frequently irreverent approach to the APA and the Supreme Court's precedents). And for most of the post-Vermont Yankee period, there has been no systematic lack of fidelity by the D.C. Circuit that would warrant a rebuke.

In the past several years, however, administrative law has entered a world that is, in important respects, the mirror image of the world before Vermont Yankee. The prioritizing of "fundamental personal interests" over "economic interests," at least as the court understood those terms in the 1960s and 1970s, has been turned upside down, and in part by an identifiable understanding of the dynamics of the political process. Today, a determined subset of judges on the D.C. Circuit explicitly hold a distinctive view -- articulated both in extrajudicial writings and in judicial opinions -- that has found its way into administrative law decisions, sometimes with questionable support in the existing legal materials and sometimes with no support whatsoever. According to that view, political distortions yield policies that depart unjustifiably, and harmfully, from the baselines set by market ordering. These policies violate liberty, properly understood, and also threaten to reduce social welfare. As a corrective, the judges have articulated an approach that we call libertarian administrative law. This approach seeks to use administrative law to push and sometimes shove policy in libertarian<sup>19</sup> directions, above all through judge-made doctrines that lack solid support in the standard legal sources.

In light of the writings of some of the relevant judges, libertarian administrative law may be understood as a second-best enterprise -- an attempt to compensate for perceived departures, during the New Deal, from the baseline of the original constitutional order. We can understand libertarian administrative law to be inspired by a particular, highly controversial account of the Constitution -- one that does not fit well with the Supreme Court's current understanding of the founding document. A central assumption in the argument is that the original constitutional order, as these judges envision it, was far more protective of liberty and of market baselines, and thus less hospitable to politically-distorted governmental decisionmaking, than is the current state of constitutional law. Libertarian administrative law, then, emerges from a long-term

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<sup>17</sup> In some of the relevant cases, however, the stakes have been high. See, e.g., EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014).

<sup>18</sup> See Scalia, supra note 2.

<sup>19</sup> On some views, the more accurate term is "classical liberal." See, e.g., RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014). There is a continuum of views among the theorists and judges we will mention; we use "libertarian" for simplicity and to capture the common denominators among these views.

programme to restore the “Lost Constitution”<sup>20</sup> -- or at least to approximate that goal as closely as possible.

Our principal aims here are descriptive and doctrinal. We seek first to establish the existence of this libertarian administrative law, to sketch its contours, and to elicit the justifications that its proponents offer. This descriptive enterprise, we hope, will be valuable without regard to normative controversies. Those who are inclined to favor libertarian administrative law, and to hope that it will flourish, will doubtless approve of some, many, or all of the doctrinal developments that we catalogue.

Our evaluative comments are offered not from the external standpoint of (say) economics, political science, philosophy, or public choice theory, but from the internal standpoint of administrative law itself. The main problem with libertarian administrative law is that it lacks sufficient respect for the legal sources, emphatically including controlling precedents of the Supreme Court -- in some cases quite recent, clear, and bipartisan precedents. Across a number of doctrinal contexts, panels of the D.C. Circuit have acted aggressively to reshape administrative law in ways that are not easy to square with the APA and governing precedents of the Supreme Court. In some cases, the D.C. Circuit can claim some (but not strong) support in those precedents; in other cases, it is operating very much on its own. At the same time, many of the resulting rulings are difficult for the Court to police -- as was progressive administrative law in the years before Vermont Yankee. In its ambitious forms, libertarian administrative law, like its progressive *doppelganger*, is best seen as a proposal for large-scale legal change, rather than a valid interpretation of current legal sources.

For reasons that we will elaborate, we believe that any significant movement in either progressive or libertarian directions would be in grave tension with the foundations of the APA and of administrative law, properly understood -- and hence that the Supreme Court would be properly criticized if it were to embrace any such movement. American administrative law is organized not by any kind of politicized master principle, but by commitments to fidelity to statute, to procedural regularity, and to nonarbitrary decisionmaking. These commitments will sometimes result in rulings that libertarians will approve, and sometimes in rulings that libertarians will deplore. Any sustained effort to engraft libertarian thinking, or some kind of progressive alternative, onto the legal materials will be unfaithful to those materials.

But our principal goal here is narrower. While we will elaborate and defend a general claim about political ideology and administrative law, our major aim is to demonstrate that in some important rulings, the D.C. Circuit has been moving in libertarian directions without sufficient warrant in existing sources of law, including the decisions of the Supreme Court itself. While most of the decisions that we discuss cannot quite be described as lawless, some can, and

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<sup>20</sup>See RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

as a whole they go beyond the boundaries of appropriate interpretation of the law as it now stands. They do so with an identifiable ideological valence.

Part I provides a brief discussion of the context, with reference to the separate opinions of the relevant D.C. Circuit judges and their extrajudicial writings on constitutional questions. Part II, the heart of the paper, describes and illustrates libertarian administrative law in six doctrinal contexts: nondelegation, commercial speech, rulemaking procedure, arbitrariness review, standing, and reviewability. Part III offers a more general evaluation of the programme of libertarian administrative law and, above all, its fit with the existing structure of American administrative law. The fit, we argue, is not good, no matter how charitably we treat the decisions. Overall, and in its ambitious forms, libertarian administrative law is best understood as part of a movement -- the “Constitution in Exile” or “Lost Constitution” movement<sup>21</sup> -- aimed at changing the framework of American public law more broadly. We suggest that on a suitable occasion, the Court should excise libertarian administrative law root and branch, by issuing a modern version of Vermont Yankee, requiring the D.C. Circuit to hew more closely to the APA and its own precedents, and also reminding lower courts that administrative law lacks any kind of ideological valence. As we will see, the Court has recently granted certiorari in two cases -- one involving the so-called “nondelegation doctrine,”<sup>22</sup> and one involving interpretive rules<sup>23</sup> -- that jointly or severally provide a suitable occasion for repudiating libertarian administrative law.

## **I. Background**

### **A. Libertarian Constitutional Law**

Some constitutional observers believe that the American Constitution is, or should be interpreted to be, libertarian in character, in the sense of protecting a specific set of rights -- especially property rights and economic rights -- from government intrusion.<sup>24</sup> On this view, libertarianism, of a certain kind, plays a central role in the constitutional settlement. The position is sometimes taken to impose sharp limits on national power, and to recognize unenumerated rights of liberty, property, and contract that go beyond existing judicial understandings.<sup>25</sup>

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<sup>21</sup> See id.; Douglas Ginsburg, Delegation Running Riot, 18 REGULATION 83, 84 (1995).

<sup>22</sup> Ass’n of Am. Railroads v. Dep’t of Transp., 721 F.3d 666 (D.C. Cir. 2013), cert. granted, 82 U.S.L.W. 3533 (U.S. June 23, 2014) (No. 13-1080).

<sup>23</sup> Mortgage Bankers Ass’n v. Harris, 720 F.3d 966 (D.C. Cir. 2013), cert. granted sub nom. Perez v. Mortgage Bankers Ass’n, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1041), and Nickols v. Mortgage Bankers Ass’n, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1052).

<sup>24</sup> See BARNETT, supra note 20, at 32-52; EPSTEIN, supra note 19, at 4.

<sup>25</sup> See EPSTEIN, supra note 19, at 303-382 for an especially detailed account.

This position has been understood to suggest that the Constitution is in some sense “lost” or “in exile.”<sup>26</sup> In academic circles, there has been a vigorous (and continuing) effort to support this suggestion, sometimes marching under the banner of “originalism,”<sup>27</sup> and sometimes invoking instead arguments from social science, moral philosophy, and political theory.<sup>28</sup> A central goal is to protect liberty and property, rightly understood, by diminishing the authority of powerful private groups, or “factions,” which, on this view, help to account for the growing, and liberty-invading, power of government. Whatever its merits as a matter of principle, no one doubts that this position would have dramatic implications, throwing much of the modern administrative state into the dustbin.<sup>29</sup>

Libertarian constitutional law has many academic defenders, even though it has not enjoyed much success on the Supreme Court. For our purposes, what is noteworthy is that several of the most prominent judges on the D.C. Circuit have explicitly endorsed understandings of this kind. We are keenly aware that extrajudicial writing by federal judges may not reflect their views about appropriate decisionmaking by courts as a whole. We shall turn shortly to the links between judicial behavior and the views we describe here.

## **B. “The Wheels Began to Come Off”**

In a speech delivered in several places and ultimately published in the Cato Supreme Court Review, Judge Douglas H. Ginsburg – one of the architects of some principles of libertarian administrative law, as we will see -- wrote that if judges are to be faithful to the written Constitution, they must try “to illuminate the meaning of the text as the Framers understood it.”<sup>30</sup> In his account, judges did exactly that from the founding until the first third of the twentieth century. In the 1930s, however, “the wheels began to come off.”<sup>31</sup> With the Great Depression and the actions of the Roosevelt Administration, the Court refused to remain faithful to the founding document.<sup>32</sup> Judge Ginsburg contended that the infidelity occurred in three different ways, each of them relevant to our topic here.

The first involved the reach of the national government. In Judge Ginsburg’s view, the Court employed “loose reasoning” and indulged in “a stark break from precedent” in upholding the National Labor Relations Act.<sup>33</sup> In his view, the Court thereby expanded congressional power under the Commerce Clause in a way that fit awkwardly, and perhaps not at all, with the

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<sup>26</sup> See BARNETT, supra note 20 (on “lost”); Ginsburg, supra note 21, at 84 (on “in exile”). EPSTEIN, supra note 19, is in the same vein.

<sup>27</sup> See BARNETT, supra note 20, at 91-119.

<sup>28</sup> See EPSTEIN, supra note 19, at 17-33.

<sup>29</sup> See generally EPSTEIN, supra note 19.

<sup>30</sup> Douglas Ginsburg, On Constitutionalism, 2002-2003 CATO SUP. CT. REV. 7, 14 (2003).

<sup>31</sup> Id. at 15.

<sup>32</sup> Id.

<sup>33</sup> Id. at 16.



Constitution as written. Second, the Court allowed administrative agencies to wield broad discretionary power, thus violating the nondelegation doctrine as embodied in Article 1, section 1.<sup>34</sup> Citing the Court's validation of a provision of the Clean Air Act that appears to grant broad discretion to the Environmental Protection Agency, Judge Ginsburg urged that the "structural constraints in the written Constitution have been disregarded."<sup>35</sup> Third, he contended that the Court has "blinked away" central provisions of the Bill of Rights.<sup>36</sup> As a particular example, he referred to the Takings Clause, which, he lamented, has been read to provide "no protection against a regulation that deprives people of most of the economic value of their property."<sup>37</sup> It seems clear that Judge Ginsburg believes that properly interpreted, the Takings Clause would provide much stronger protection of property rights than it now does.

Three cornerstones of libertarian constitutional law involve certain conceptions of federalism, delegation, and individual rights. As early as 2003, Judge Ginsburg endorsed a version of all of them. But he is not the only judge on the Circuit to hold such views.

### C. "Underground Collectivist Mentality"

Judge Janice Rogers Brown has spoken in even stronger terms, seeing the New Deal, and the rise of modern administrative agencies, as a clear betrayal of the original constitutional settlement. In a speech in 2000,<sup>38</sup> for example, she contended that the New Deal "inoculated [sic] the federal Constitution with a kind of underground collectivist mentality," which transformed the Constitution "into a significantly different document."<sup>39</sup> She objected to Justice Holmes' celebrated dissenting opinion in *Lochner* as "all too famous" and lamented that in the 1930s, the "climate of opinion favoring collectivist social and political solutions had a worldwide dimension."<sup>40</sup> In these ways, she suggested that the New Deal was essentially unconstitutional and that Holmes' deferential approach was unjustified.

But she also offered a more specific critique of the New Deal period. In her view, the collectivist (communist?) creed "that differences between the few and the many can, over time, be erased," should be seen as "a critical philosophical proposition underlying the New Deal."<sup>41</sup> That creed was fatally inconsistent with the founding document. Indeed, it worked "not simply to

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<sup>34</sup> *Id.* at 16-17.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Janice Rogers Brown, Associate Justice, Cal. Sup. Ct., Address to the Federalist Society at the University of Chicago Law School, "A Whiter Shade of Pale": Sense and Nonsense —The Pursuit of Perfection in Law and Politics (Apr. 20, 2000), [available at](http://perma.cc/T2VS-4J7F) <http://perma.cc/T2VS-4J7F>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

repudiate, both philosophically and in legal doctrine, the framers' conception of humanity, but to cut away the very ground on which the Constitution rests.”<sup>42</sup>

For Judge Brown, the upshot is that “the economic convulsions of the late 1920's and early 1930's . . . consumed much of the classical conception of the Constitution.”<sup>43</sup> Notably, and with a judgment that overlaps with that of Judge Ginsburg, she contends that “[p]rotection of property was a major casualty of the Revolution of 1937.”<sup>44</sup> As a result, it “became government's job not to protect property but, rather, to regulate and redistribute it.”<sup>45</sup> In the current era, moreover, “there are even deeper movements afoot. Tectonic plates are shifting and the resulting cataclysm may make 1937 look tame.”<sup>46</sup> Needless to say, this statement was meant as a warning.

Judge Brown went further still. Speaking of government authority, she said, “[W]e no longer find slavery abhorrent. We embrace it.”<sup>47</sup> She also cautioned, “If we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a kleptocracy - a license to steal, a warrant for oppression.”<sup>48</sup>

#### **D. Off the Bench, On the Bench: “[P]roperty is At the Mercy of the Pillagers”**

There is a gulf between extrajudicial statements by federal judges and actual behavior on the bench. It would be wrong and unfair to think that any extrajudicial statement is necessarily a helpful guide to judicial behavior, because role greatly matters, and because the judicial role imposes constraints that judges do not face when they are giving speeches. A judge might firmly believe that the New Deal, the Great Society, and the Affordable Care Act were serious mistakes, while also believing, quite firmly, that those personal beliefs play no legitimate role in legal interpretation. A judge might even believe that the Supreme Court has taken some gravely wrong turns, or even gone off the rails, while also following the very decisions that she abhors. But speeches of this kind, demonstrating a shared antipathy to the New Deal and its constitutional legitimization, are at least relevant data points.

In any event, the judges at the core of the libertarian movement in administrative law have not declined to enlist their beliefs while on the bench as well. In both majority opinions and separate opinions, the relevant judges have explained their constitutional project, its limits under the current New Deal constitutional order, and the second-best administrative-law project that flows from these. We will discuss majority opinions shortly. For now, we will focus on the

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Janice Rogers Brown, Speech to the Institute for Justice, *Fifty Ways to Lose Your Freedom* (Aug. 12, 2000), [available at](http://communityrights.org/PDFs/8-12-00IFJ.pdf) <http://communityrights.org/PDFs/8-12-00IFJ.pdf>.

startling concurrence filed by Judges Brown and David Sentelle in a case called Hettinga v. United States<sup>49</sup> from 2012. The Hettinga concurrence is best understood as a kind of manifesto of libertarian administrative law.

Hettinga involved a statute, the Milk Regulatory Equity Act of 2005, that “subjected certain large producer-handlers of milk to contribution requirements applicable to all milk handlers.”<sup>50</sup> Under the complex and highly reticulated federal regulatory scheme that governs the production and sale of milk, the Hettinga family operated two enormous industrial dairy farms that enjoyed a special regulatory exemption from federal milk-marketing orders.<sup>51</sup> In 2005, however, a new statute extended the regulatory scheme to cover the Hettingas’ operations, although it left in place the exemptions for other large firms in other areas.<sup>52</sup> Indeed, the Hettingas claimed that their operations were in practice the only ones currently covered by the statutory extension, although the terms of the statute did not mention them by name and used facially neutral criteria tied to the size and location of firms.<sup>53</sup> The Hettingas attacked the statute on constitutional grounds, claiming that it amounted, in effect, to a forbidden Bill of Attainder, and that it violated the constitutional guarantee of equal protection of the laws.<sup>54</sup>

In a per curiam opinion, the panel unanimously disposed of the Hettingas’ claims under settled constitutional law.<sup>55</sup> Even if the statute currently covered only the Hettingas, it was in principle facially neutral and open-ended, and would cover any firm that in the future met the statutory criteria; for that reason, it lacked the targeting and closure necessary to constitute a bill of attainder.<sup>56</sup> As for the equal protection argument, the statute did not impinge on any fundamental right or deploy any suspect classification, and thus needed only to survive rational-basis review.<sup>57</sup> And there was easily a rational basis: the statute in effect closed loopholes in the scheme of dairy regulation by removing a regulatory exemption that the Hettingas’ massive operations had previously enjoyed.<sup>58</sup>

Under current law, the case was easy, and might have been disposed of summarily. Judge Brown, however, offered a separate opinion -- joined by Judge Sentelle, and thus signed by a majority of the panel -- that heatedly criticized the fundamental premises underpinning the whole New Deal constitutional order.<sup>59</sup> For Brown, the case revealed “an ugly truth: America's cowboy

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<sup>49</sup> 677 F.3d 471, 480-83 (D.C. Cir. 2012) (Brown, J., concurring).

<sup>50</sup> Id. at 474 (per curiam).

<sup>51</sup> Id. at 475.

<sup>52</sup> See Id. at 476.

<sup>53</sup> See Id.

<sup>54</sup> Id. The Hettingas also advanced a due process claim, Id. at 479-80, but this is not relevant for our purposes.

<sup>55</sup> See Id. at 474.

<sup>56</sup> Id. at 477-78.

<sup>57</sup> Id. at 478.

<sup>58</sup> Id. at 479.

<sup>59</sup> Id. at 480-83 (Brown, J., concurring).

capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.”<sup>60</sup> On this view, “the judiciary's refusal to consider the wisdom of legislative acts—at least to inquire whether its purpose and the means proposed are ‘within legislative power’” -- have lead inevitably to the Court “abdicat[ing] its constitutional duty.”<sup>61</sup> Most remarkably of all, and consistent with her speeches, Brown attempted to connect her economic libertarianism with a version of the original understanding:

This standard [rational-basis review of economic regulation] is particularly troubling in light of the pessimistic view of human nature that animated the Framing of the Constitution—a worldview that the American polity and its political handmaidens [*sic*] have, unfortunately, shown to be largely justified. See James Madison, Notes of Debates in the Federal Convention of 1787, at 39, 42 (W.W. Norton & Co. 1987). Moreover, what the Framers theorized about the destructive potential of factions (now known as special or group interests), experience has also shown to be true. The Federalist No. 10, at 78, 81 (James Madison) (Clinton Rossiter ed., 1961). The judiciary has worried incessantly about the “countermajoritarian difficulty” when interpreting the Constitution. But the better view may be that the Constitution created the countermajoritarian difficulty in order to thwart more potent threats to the Republic: the political temptation to exploit the public appetite for other people's money—either by buying consent with broad-based entitlements or selling subsidies, licensing restrictions, tariffs, or price fixing regimes to benefit narrow special interests.<sup>62</sup>

In this vision, the “countermajoritarian Constitution” enforced by searching judicial review protects the public interest from both broad-based entitlements that corrupt the citizenry, and also from exploitation by narrow special interests, whereas “[r]ational basis review means property is at the mercy of the pillagers.”<sup>63</sup>

It is not obvious who the “pillagers” are supposed to be, or exactly what goods Brown thinks a countermajoritarian judiciary, protecting economic liberty, is supposed to produce. Mightn’t the “narrow special interests” themselves use the judiciary to protect their privileged position?<sup>64</sup> If the problem is with human nature, aren’t judges human too, and thus by hypothesis prone to abuse the expanded power that Brown would give them?<sup>65</sup> Perhaps there are plausible

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<sup>60</sup> *Id.* at 480.

<sup>61</sup> *Id.* at 481.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 483.

<sup>64</sup> See Elhauge, *supra* note 13, at 67 (“the litigation process cannot be treated as exogenous to interest group theory: it too is susceptible to interest group influences”).

<sup>65</sup> See Eric Posner & Adrian Vermeule, *Inside or Outside the System?* 80 U. CHI. L. REV. 1743, 1750-54 (2013).

answers to such questions, and to her credit, Judge Brown is candid in acknowledging that binding constitutional precedent was inconsistent with her vision of the constitutional order.<sup>66</sup>

Our thesis, however, is that on important occasions, Judge Brown and a critical mass of her colleagues on the D.C. Circuit -- especially including Judges Ginsburg and Sentelle, joined on occasion by Judges Henderson, Randolph, Silberman, and Williams -- have turned their efforts elsewhere. Unable to make significant progress on the constitutional margin (except insofar as constitutional doctrines and administrative law doctrines plainly overlap), they are engaged in an effort to protect the market from its would-be “pillagers” by means of administrative law. In several cases, they have been willing to criticize the Supreme Court itself. Consider, for example, Judge Brown’s remarkable attack on Massachusetts v. EPA in the context of a plea for Supreme Court reconsideration: “I do not choose to go quietly [and I engage] Massachusetts’s interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA.”<sup>67</sup>

In short, Judge Brown and some of her colleagues, generally stymied on the constitutional front, have pursued a second-best project, one that attempts to move the apparently nonideological and recalcitrant materials of administrative law in libertarian directions. We will also see that they have attempted to fold disfavored modes of constitutional libertarianism, such as substantive due process protection of property and economic liberty, into constitutional law itself, especially with nondelegation and commercial speech law; that too is a kind of substitute for the ideal. We now turn to documenting their second-best project and its problems.

## II. Libertarian Administrative Law

To establish the existence of libertarian administrative law, we could imagine a range of strategies. Perhaps the most obvious would be quantitative. We might compile a large data set and investigate voting behavior. Suppose, for example, that certain judges rarely, or never, vote in favor of environmental groups or labor organizations when they argue for more aggressive regulation. Suppose that the same judges vote almost always, or always, for companies when they attempt to invalidate regulation. If so, we might have a strong hint that those judges would be practicing at least some form of libertarian administrative law. Indeed, it might be thought that we have a kind of “smoking gun.”

In fact, quantitative studies of this general kind do exist.<sup>68</sup> They tend to show a significant asymmetry between the voting behavior of Republican appointees and that of Democratic

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<sup>66</sup> See 677 F.3d at 480 (Brown, J., concurring).

<sup>67</sup> Coal. for Responsible Regulation, Inc. v. E.P.A., 684 F.3d 102 (D.C. Cir. 2012), reh’g en banc denied, No. 09-1322, 2012 WL 6621785, at \*3 (Dec. 20, 2012) (Brown, J., dissenting).

<sup>68</sup> See Richard Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 VA. L. REV. 1717 (1993); Emerson Tiller & Frank Cross, Judicial Partisanship and Obedience to Legal Doctrine, 107 YALE L.J. 2155 (1998); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An

appointees, with the former showing a distinctive tendency in what is, broadly speaking, the libertarian direction, and the latter showing a distinctive tendency in what is, broadly speaking, the progressive direction.<sup>69</sup> Thus, for example, Republican appointees are more likely to vote to uphold agency decisions under a Republican president, when agency decisions are more likely to be deregulatory; Democratic appointees show the opposite pattern. If we code decisions by asking whether a regulated entity is seeking to fend off regulation, or whether some kind of public interest group is seeking to impose heightened regulatory requirements, we will see an unmistakable “skew” on both sides. Within the D.C. Circuit, the same patterns have been found in the past, though we lack recent data.<sup>70</sup> On the basis of these findings, we might reasonably speculate that the Democratic appointees are drawn to some form of progressive administrative law, whereas Republican appointees vote in more libertarian directions.

But it is important to be careful with such findings. By themselves, they might turn out to be too coarse-grained to demonstrate any kind of progressive or libertarian administrative law. Perhaps one or another side is simply right, on the basis of the existing legal materials, and ideological predispositions are unimportant or less important. Perhaps some kind of tendency, measured by votes, tells us nothing about progressive or libertarian inclinations, at least if it is unaccompanied by an analysis of the legal foundations for those votes. To date, moreover, we do not have more specific evidence, showing differences across individual judges. (Nor do we have contrary evidence; the relevant questions have not been investigated in sufficient detail.) Any such evidence would be helpful, assuming that statistical power could be achieved; if some judges almost always vote in favor of challenges by regulated entities, some kind of libertarian inclination might plausibly be inferred. But even large data sets, tabulating mere votes, would also raise questions about appropriate generalizations across what would inevitably be a heterogeneous range of disputes. Votes alone may be uninformative unless they have some tension with the governing legal materials (such as the APA or decisions of the Supreme Court), which a tabulation as such cannot demonstrate.

Furthermore, however convincing such findings would be as social science, they would necessarily provide only an external perspective. Our method here is internal and doctrinal rather than quantitative. If it were possible to show that certain judges embraced distinctively libertarian doctrinal principles, we would be able to establish the existence of libertarian administrative law, and the demonstration would be more powerful still if current legal materials, from authoritative statutes and the Supreme Court, did not support those doctrinal principles. To a significant extent, we hope to establish exactly that. At the same time, some doctrinal

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Empirical Investigation of Chevron, 73 U. CHI. L. REV. 823 (2006); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008).

<sup>69</sup> *Id.*

<sup>70</sup> See Revesz, *supra* note 68, at 1719; Frank Cross and Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 YALE L.J. 2155 (1998).

categories cannot be self-evidently categorized along a libertarian-nonlibertarian continuum. Nonetheless, we hope to show that the linkage is sufficiently clear.

Three qualifications must be offered at the outset, lest we take on a greater burden of proof than we should have to carry. First, we do not claim that the D.C. Circuit, or some subset of its judges, have invariably ruled in libertarian directions, in blatant defiance of the APA and the Supreme Court. We could devise a imaginary court that would do so – with, for example, new principles that always denied standing to those seeking more aggressive regulation, or arbitrariness review that proved to be a systematic barrier to regulatory intervention, or changes in existing doctrines that denied agencies any kind of deference whenever they interpreted statutes in such a way as to increase their regulatory authority. The D.C. Circuit is not that imaginary court, and no subset of its members can be counted as such. It would be easy to find a set of D.C. rulings, joined by all of its members, that uphold agency decisions that libertarians abhor, or that invalidate agency decisions that libertarians approve. Because of their distinctive role, judges care about the law, and they cannot and do not act in a single-minded way. Nonetheless, we do hope to show an unmistakably libertarian pattern, paralleling the progressive patterns of several decades ago.

Second, the nature of legal doctrine is such that most rules rest on multiple rationales; they are overdetermined by arguments. Given that fact, it will rarely be possible to demonstrate that any particular doctrine is dictated, necessarily and exclusively, by the project of libertarian administrative law. In the aggregate, however, over a set or series of doctrinal questions, a convincing pattern may emerge. Schematically, suppose there are three independent doctrinal questions: 1, 2, and 3. On question 1, the panel adopts a position whose possible rationales are L (the libertarian rationale) or O<sup>1</sup> (some other rationale). On question 2, the panel adopts a position whose possible rationales are L or O<sup>2</sup> (different from O<sup>1</sup>). On question 3, the panel adopts a position whose possible rationales are L or O<sup>3</sup> (different from both O<sup>1</sup> and O<sup>2</sup>). As to any particular one of these doctrinal questions, libertarianism is not the only possible reading of the panel's position. Over all of them, however, because the alternative rationales are different in each case, the libertarian reading becomes more convincing. It is no valid objection to our account, therefore, to show that the libertarian programme is not the sole plausible explanation for any given doctrine. The evidence must be viewed in the aggregate.

Third, the nature of judicial decisionmaking in Article III courts is such that the doctrinal questions fairly presented by the cases are rarely perfectly tailored to advance an ideological agenda. Judges have to resolve questions presented by parties, in messy factual and legal contexts, and have to implement their large-scale understandings of administrative and constitutional law through doctrinal devices -- rules, presumptions, qualified standards, and so forth -- that are not perfectly calculated to capture all and only the outcomes that a libertarian judge will want to capture. It suffices if the holding, and an associated doctrine, are better

calculated to capture libertarian outcomes, on average and in the long run, than are the feasible alternative holdings available to the judge in the case.

It is not a sufficient objection to our account, therefore, to point out that we do not discuss doctrines and holdings that cannot be characterized as libertarian, or that the doctrines and holdings that we discuss do not capture certain outcomes libertarians would like, or sweep in certain outcomes libertarians do not like. Real doctrines will rarely if ever be perfectly tailored to capture libertarian (or progressive) outcomes, or to promote libertarian (or progressive) aims. Instead our proper burden is to show that the relevant doctrines and holdings are plausibly calculated to capture libertarian outcomes and promote such aims in a rough, aggregate, long-run way, relative to the available alternatives.

## A. Nondelegation

1. *Preliminaries.* The nondelegation doctrine is widely understood to forbid Congress from “delegating” its legislative power. On the standard view, Congress may not grant discretionary authority to the executive branch, to independent agencies, or to private parties without imposing an “intelligible principle” to constrain that authority.<sup>71</sup> An extreme example, often given in some form or other to suggest that the standard view must be correct, is a statute authorizing the President to do “whatever he deems appropriate to make the United States a better nation by his lights.”<sup>72</sup>

Congress has never given a public or private institution that degree of discretion, but since the beginning of the Republic, it has allowed agencies to exercise a great deal of open-ended authority.<sup>73</sup> Contrary to a widespread view, there is nothing new about legislative grants of discretion, and the New Deal did not, with respect to such grants, break new ground.<sup>74</sup> For that reason, the originalist argument on behalf of the nondelegation doctrine remains controversial and contested, with some of the most recent and detailed historical account raising serious doubts.<sup>75</sup> It is worth underlining that point. As a matter of history, the originalist embrace of the nondelegation doctrine is not simple to explain.

For its part, the Supreme Court has shown little enthusiasm for the nondelegation doctrine. It is often remarked that the first year in which the Court invoked the doctrine to strike down an act of Congress was 1935 (notably, at the height of the New Deal era, when the

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<sup>71</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>72</sup> *But see* Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 9 U. CHI. L. REV. 1721, 1741-43 & n.81 (2002) (criticizing the use of this worst-case hypothetical as a premise for formulating rules of constitutional law).

<sup>73</sup> *See Id.* at 1735-36; *see generally* JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* (2010).

<sup>74</sup> *See* Posner & Vermeule, *supra* note 72, 1735-36; MASHAW, *supra* note 73.

<sup>75</sup> *See* MASHAW, *supra* note 73, at ix.



executive branch and the Court were at war).<sup>76</sup> But that was also the last year in which the Court invoked the doctrine to strike down an act of Congress. For nearly eighty years since that time, the unbroken record of non-use is noteworthy in light of the fact that the Court has had numerous opportunities to invoke the doctrine, having dealt with many arguably open-ended grants of discretionary authority.<sup>77</sup>

Despite the Court's lack of interest in the nondelegation doctrine, libertarians have long shown considerable enthusiasm for it, and have argued vigorously on behalf of its revival.<sup>78</sup> Their suspicion of government power, and their desire to preserve a sphere of private autonomy, help to account for that enthusiasm.<sup>79</sup> At first glance, however, the libertarian focus on the nondelegation doctrine might seem a bit puzzling, because the doctrine is designed to promote accountability, whose relationship to libertarian goals is not entirely clear. Through specific legislation, Congress might well authorize significant intrusions on private rights as libertarians understand them. In such cases, the nondelegation doctrine provides scant comfort. And indeed, some statutes do contain clear standards and do intrude on what libertarians regard as private rights.

Put in its best light, libertarian enthusiasm for the nondelegation doctrine can be explained in the following terms. Suppose that we believe (with Judge Brown, among many others) that a central goal of the Constitution is to safeguard private liberty, and to do so by constraining the influence of private factions. If so, then there is a plausible argument on behalf of the nondelegation doctrine as a way of achieving that goal. It might well be thought that by requiring members of Congress to surmount the difficulty of agreeing on a specific form of words, and by forbidding legislation that lacks such agreement, the nondelegation doctrine reduces the likelihood that law will be enacted at all.<sup>80</sup> If national law itself is seen as potentially threatening to liberty, this constraint will seem appealing. A supplemental idea is that whenever Congress gives discretionary authority to the executive branch, it unleashes a risk of interest-group capture.<sup>81</sup> The safeguards that are built into the structure of the national legislature serve to reduce that risk. When Congress grants open-ended discretionary power to others, it allows those safeguards to be evaded.

With these understandings, the libertarian enthusiasm for the nondelegation doctrine ceases to be a mystery. But there is a further puzzle, both because the nondelegation doctrine

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<sup>76</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>77</sup> See, e.g., *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472-76 (2001); see generally *Id.* at 474 (citing cases).

<sup>78</sup> See, e.g., Christopher Demuth, *OIRA At Thirty*, 63 ADMIN.L. REV. 15, 17-21 (2011); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 251-264 (2010).

<sup>79</sup> See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 36-37, 63-67 (1982).

<sup>80</sup> See *Id.* at 63-65.

<sup>81</sup> See *Id.* at 63-67.

would block open-ended delegations of discretion to deregulate, and because constraining delegations at the federal level does nothing to prevent liberty-restricting regulation at the state level. As to the former issue, many libertarian arguments in favor of the nondelegation doctrine tacitly assume the baseline of 1789, a baseline that no longer exists. In a world already chock-full of federal regulation, it might be worthwhile for libertarians to consider the possibility that administrative discretion to deregulate – and self-conscious deregulation did occur in the 1980s and 1990s in some regulated industries, and has occurred periodically since that time -- should be promoted, not hampered.

As to the latter issue, the libertarian view must also come to terms with the complexity of the federal system, in which vigorous affirmative federal lawmaking may well be necessary -- and has historically often been necessary -- to prevent local oppression that is itself deeply objectionable on libertarian premises, or ought to be. Jim Crow was not a libertarian policy. By raising the barriers to the enactment of federal legislation, the nondelegation doctrine might make it more difficult for the national government to protect against intrusions on liberty by the states. Perhaps the libertarian view, rightly conceived, is that the nondelegation doctrine *generally* protects against unjustified intrusions on liberty, and that it does little to restrict liberty-protecting, state-controlling action at the national level, especially if the Constitution is taken to create independent barriers to intrusions on liberty at the state level.

*2. Doctrinal departures.* Our principal goal here is to outline the libertarian argument, not to evaluate it. For present purposes, the important point is that the D.C. Circuit has twice developed its own nondelegation doctrine, operating independently of the Supreme Court's, and in the face of that Court's noticeable lack of enthusiasm for that doctrine.

The first forays occurred in the 1990s, when the court, quite remarkably, raised serious constitutional doubts about central provisions of both the Occupational Safety and Health Act and the Clean Air Act.<sup>82</sup> The court relied on two different ideas. The first was that if Congress failed to impose real bounds on agency discretion – in the form of floors and ceilings that were not too far apart – it would run afoul of the nondelegation doctrine.<sup>83</sup> The second idea was that in the face of an otherwise unconstitutional grant of discretion, agencies could solve the problem by adopting clear rules that would constrain their own discretion.<sup>84</sup>

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<sup>82</sup> *Am. Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (*ATA*) (holding that EPA's construction of §§ 108 and 109 of the Clean Air Act was an unconstitutional delegation of legislative power); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Occupational Safety & Health Admin.*, 938 F.2d 1310, 1313 (D.C. Cir. 1991) (*Lockout/Tagout I*) (holding that OSHA's construction of its organic statute was an unreasonable construction "in light of nondelegation principles").

<sup>83</sup> See *ATA*, 175 F.3d at 1034; *Lockout/Tagout I*, 938 F.2d at 1316-17.

<sup>84</sup> *ATA*, 175 F.3d at 1038; *Lockout/Tagout I*, 938 F.2d at 1313.

If the Supreme Court had not rejected them in emphatic terms,<sup>85</sup> both of these ideas could have turned out to be exceedingly important. As the court's rulings suggested, the first might well throw a great deal of modern legislation into serious doubt. If the nondelegation doctrine threatens core provisions of the Occupational Safety and Health Act and the Clean Air Act – arguably, in fact, *the* core provisions – then there is little doubt that it threatens many regulatory statutes, in a way that fits well with the libertarian agenda. The second idea, by contrast, provides a kind of lifeline to agencies, authorizing them to “solve” the nondelegation problem by cabining their own discretion. From the standpoint of libertarian aspirations, the lifeline is nothing to celebrate, and it is constitutionally troublesome to boot. Nonetheless, there are real advantages to situations in which agencies are required to cabin their discretion. If they do so, they promote clarity and predictability, above all for members of regulated classes, and perhaps that approach is a sufficiently satisfactory second-best on libertarian (and other) grounds, or at least an improvement over a situation in which agency discretion is not so cabined.<sup>86</sup>

The problem is that both of these ideas utterly lacked support in Supreme Court doctrine, and hence it was not surprising when a unanimous Court rejected them.<sup>87</sup> The Court noted that the point of the nondelegation doctrine is to require *Congress* to offer an intelligible principle, and that if it has failed to do so, the problem cannot be cured if the agency itself offers such a principle.<sup>88</sup> More fundamentally, the Court made plain its lack of enthusiasm for essentially any modern use of the nondelegation doctrine. The Court largely relied on its own precedents, pointedly quoting its statement to the effect that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>89</sup> The Court added that it had “found an ‘intelligible principle’ in various statutes authorizing regulation in the ‘public interest.’”<sup>90</sup> After the Court's unanimous decision, it would be fair to say this of the nondelegation doctrine: Dead again.

But the D.C. Circuit has yet to receive the coroner's certificate. In an extraordinary decision in 2013, on which the Supreme Court recently granted certiorari, the lower court invoked a version of the nondelegation doctrine to strike down an important federal statute. Association of American Railroads<sup>91</sup> involved a provision of the Passenger Rail and Investment Improvement Act of 2008, which was designed, among other things, to promote the interests of Amtrak, which Congress has long considered to be of central importance to the nation's railroad

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<sup>85</sup> See Am. Trucking, 531 U.S. at 472-76.

<sup>86</sup> See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); see also ATA, 175 F.3d at 108 (“If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily.”).

<sup>87</sup> Am. Trucking, 531 U.S. at 472-76.

<sup>88</sup> Id. at 472.

<sup>89</sup> Id. at 474-75.

<sup>90</sup> Id. at 474.

<sup>91</sup> Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013), cert. granted, 82 U.S.L.W. 3533 (U.S. June 23, 2014) (No. 13-1080).

system.<sup>92</sup> Under federal law, railroads are required to make their tracks available for use by Amtrak.<sup>93</sup> Under the Act, the Federal Railroad Administration and Amtrak must jointly “develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.”<sup>94</sup> In the event of disagreement between the FRA and Amtrak, either may petition the Surface Transportation Board, which can appoint an arbitrator to help the parties to reach agreement through binding arbitration.<sup>95</sup> These metrics and standards matter, because they help determine whether Amtrak, rather than another rail carrier, should be entitled to use the tracks.

The problem in the case arose when the FRA, working together with Amtrak, issued metrics and standards to which the Association of American Railroads objected.<sup>96</sup> As a standard nondelegation case, the outcome would be simple to resolve. The Act does not give the FRA anything like a blank check. In authorizing the agency to develop metrics and minimum standards, it provides a series of intelligible principles for the agency to consider.<sup>97</sup> For the court, however, the key problem lay elsewhere: the fact that the Act effectively delegated public power to Amtrak, which the court called a “private” organization.<sup>98</sup> For the court, it was as if Congress had “given General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers.”<sup>99</sup>

In reaching its conclusion, the court broke a good deal of new doctrinal ground. First, it asserted that even if Congress set out an intelligible principle, it could not delegate public power to private groups. “Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.”<sup>100</sup> Second, it ruled that Amtrak is a private corporation.<sup>101</sup> It so ruled notwithstanding several contrary indicators: Amtrak’s Board of Directors includes the Secretary of Transportation, seven other presidential appointees, and the President of Amtrak (who is appointed by the eight other Board members); the federal government owns all 109 million shares of Amtrak’s preferred stock; and without congressional largesse, Amtrak would face financial ruin.<sup>102</sup> In addition, the Supreme Court had itself ruled, without the slightest ambiguity, that Amtrak “is part of the Government for purposes of the First Amendment,”<sup>103</sup> and hence that Amtrak is a state actor at least for those constitutional purposes.

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<sup>92</sup> *Id.* at 668-69.

<sup>93</sup> *Id.* (citing 49 U.S.C. § 24308).

<sup>94</sup> *Id.* at 669 (quoting Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub.L. No. 110–432, § 207(a) (codified at 49 U.S.C. § 24101 (note))).

<sup>95</sup> *Id.* (quoting PRIIA, § 207(d) (codified at 49 U.S.C. § 24101 (note))).

<sup>96</sup> *Id.* at 669-70.

<sup>97</sup> *See id.* at 674 (“[I]f [Amtrak] is just one more government agency—then the regulatory power it wields under § 207 is of no constitutional moment.”).

<sup>98</sup> *Id.* at 668.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 671.

<sup>101</sup> *Id.* at 677.

<sup>102</sup> *Id.* at 674.

<sup>103</sup> *Id.* at 676 (quoting *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995)).

To escape the force of these points, the court emphasized what it took to be first principles. In its view, “delegating the government’s powers to private parties saps our political system of democratic accountability,” and such delegations are “particularly perilous” in view of the fact “the belief that disinterested government agencies ostensibly look to the public good, not private gain.”<sup>104</sup> Under the Act, Amtrak is given “a distinct competitive advantage,” in the form of an ability to limit “the freight railroads’ exercise of their property rights over an essential resource.”<sup>105</sup> For this reason, the corporation might devise “metrics and standards that inure to its own financial benefit rather than the common good.”<sup>106</sup>

Some of these abstractions have force, but it is hard to resist the conclusion that the court is engaging in a kind of free-form doctrine-building, with a distinctive libertarian cast. Congress has undoubtedly made a judgment -- indeed a repeated series of judgments, over decades -- that Amtrak itself is in the national interest, perhaps because Amtrak reduces congestion on the roads and in the air, perhaps because it creates external benefits of other kinds (such as reduction of air pollution) or perhaps because it has cultural benefits. In support of that fundamental judgment, Congress funds Amtrak, creates a special structure of government oversight for it, and also allowed it to play a part in producing metrics and standards. Indeed Congress itself made a deliberate, considered choice to build in an advantage for Amtrak, a priority over competitors. The court did not adequately describe, or perhaps simply found objectionable, the very point of the statutory scheme. It is not as though that statutory scheme was itself created by Amtrak; rather it was created by “presumptively disinterested”<sup>107</sup> public officials, namely legislators, who believed that giving Amtrak a preferred legal position would itself create desirable incentives for enforcement of a scheme that those legislators found socially desirable overall.

In any event, and perhaps most fundamentally, the priority for Amtrak is hardly unbounded; Amtrak is constrained in multiple ways, and under the Act, there is no grant of open-ended discretion to make law and policy. The Act specifies relevant factors, thus limiting any capacity for self-dealing;<sup>108</sup> judicial review is available both for consistency with law and for arbitrariness;<sup>109</sup> the FRA must agree;<sup>110</sup> in the face of disagreement, Amtrak cannot prevail, but must submit to arbitration.<sup>111</sup> In Association of American Railroads itself, moreover, there was no disagreement between FRA and Amtrak.

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<sup>104</sup> *Id.* at 675.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 676.

<sup>107</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), which objects to delegations to private persons, distinguishing them from delegations to “presumptively disinterested” public officials.

<sup>108</sup> PRIIA, § 207(a).

<sup>109</sup> APA, 5 U.S.C. § 706(2).

<sup>110</sup> PRIIA, § 207(a).

<sup>111</sup> *Id.*

We should be able to accept the proposition that Congress cannot delegate adjudicatory authority to an interested party, at least if that adjudication directly affects protected interests in liberty or property. That proposition is entrenched in current doctrine – under the rubric of the due process clause,<sup>112</sup> not the nondelegation doctrine. Insofar as rulemaking is involved, whatever process Congress provides is due process, and the due process clause drops out as a separate constraint<sup>113</sup> (as the court of appeals seemed to misunderstand<sup>114</sup>). We can appreciate the view that in light of the risk of interest-group power, a grant of rulemaking authority to private groups might create more serious objections than an equivalent grant to a public agency. But that was not the situation in Association of American Railroads. The court’s decision is best seen as a new effort to reanimate a dead doctrine, an effort rooted not in existing rulings but in abstractions from one (controversial) reading of constitutional and political theory, evidently connected with the views that we traced in Part I. The Supreme Court’s decision, expected next Term, is an opportunity to bring home the message that the D.C. Circuit has repeatedly failed to hear: at least outside of very extreme circumstances, invalidation on nondelegation grounds is not a permissible move in administrative law.

## B. Commercial Speech and Disclosure

First amendment cases are typically treated as part of constitutional law, not administrative law, and for good reason. The principal free speech doctrines grew out of cases that involved political dissent, and that had nothing to do with administrative law as such.<sup>115</sup> But in the modern era, regulatory policy often involves speech, and in particular often involves efforts to regulate or to compel disclosure.<sup>116</sup> It would be possible, of course, to deem such efforts to be “arbitrary or capricious” under the APA, or to invade the constitutionally protected property rights of regulated firms. But those two avenues are more costly for judges; in particular, as we will see, the Circuit’s aggressive use of arbitrariness review on the Securities and Exchange Commission has drawn increasing scrutiny.<sup>117</sup> Thus in some of the key cases, the Circuit has invoked principles that protect “commercial speech.”<sup>118</sup> And in so doing, it has

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<sup>112</sup> Tumey v. Ohio, 273 U.S. 510, 523 (1927).

<sup>113</sup> Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

<sup>114</sup> Am. Railroads, 721 F.3d at 675 (citing due process precedents in support of its nondelegation holding).

<sup>115</sup> See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding unconstitutional under the First Amendment a state statute that criminalized mere advocacy and assembly to advocate while failing to distinguish mere advocacy from incitement to imminent lawless action).

<sup>116</sup> For general discussion, see OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

<sup>117</sup> See infra Part 2.D.

<sup>118</sup> See R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012); Nat’l Ass’n of Mfrs. v. S.E.C., No. 13-5252, 2014 WL 1408274, 748 F.3d 359 (D.C. Cir., Apr. 14, 2014) (Conflict Minerals Case). Note: Professor Sunstein worked on the underlying regulation while serving as Administrator of the Office of Information and Regulatory Affairs during the first term of the Obama Administration.

imposed a kind of libertarian administrative law on regulators who are responding to unambiguous congressional mandates.

A key example involves graphic warnings on cigarette packages. Congress explicitly called for such warnings from the FDA,<sup>119</sup> which imposed them after an extensive rulemaking process.<sup>120</sup> In a decision conflating political speech and commercial advertising,<sup>121</sup> the court struck down those warnings. In an opinion by Judge Brown, the court began as if it was protecting political dissenters: “Both the right to speak and the right to refrain from speaking are ‘complementary components of the broader concept of individual freedom of mind’ protected by the First Amendment.”<sup>122</sup> Carefully navigating its way through the precedents, the court said that the “inflammatory images . . . cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”<sup>123</sup>

Remarkably, the court invalidated the warnings on the ground that the “FDA has not provided a shred of evidence—much less the ‘substantial evidence’ required by the APA—showing that the graphic warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke.”<sup>124</sup> Offering its own view of the record – a view inconsistent with that of many experts, who have studied the matter in detail<sup>125</sup> – the court concluded that the rule must be struck down because the FDA offered “no evidence showing that such warnings have directly caused a material decrease in smoking rates in any of the countries that now require them.”<sup>126</sup> The FDA’s evidence, coming largely from reductions in smoking after graphic warnings were required in Canada, did involve inferences, rather than a randomized controlled trial.<sup>127</sup> But no such trial was available to the FDA, and the inferences were very much of the kind that lie at the core of administrators’ competence. As we will see when we discuss arbitrariness review -- and the “commercial speech” cases are to a large degree arbitrariness review under a more impressive constitutional rubric -- the Supreme Court has recently, and pointedly, warned lower courts not to interfere with agencies’ prerogative to draw unprovable causal and empirical inferences under conditions of uncertainty.<sup>128</sup>

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<sup>119</sup> Family Smoking Prevention and Tobacco Control Act, Pub.L. No. 111–31, § 201(a), 123 Stat. 1776, 1842–45 (2009) (codified at 15 U.S.C. § 1333).

<sup>120</sup> Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011).

<sup>121</sup> Reynolds Tobacco, 696 F.3d 1205.

<sup>122</sup> Id. at 1211.

<sup>123</sup> Id. at 1216–17.

<sup>124</sup> Id. at 1219.

<sup>125</sup> A valuable discussion is Christine Jolls, Product Warnings, Debiasing, and Free Speech, 169 J. Institutional and Theoretical Economics 53 (2013). See also 696 F.3d at 1225 (Rogers, J., dissenting) (citing 76 Fed.Reg. at 36,696–97) (explaining that the FDA’s reliance on graphic warnings is based on findings “well-established in the scientific literature”).

<sup>126</sup> Id. at 1219.

<sup>127</sup> See id. at 1219–20 (discussing the Canadian study).

<sup>128</sup> See infra Part 2.D.

In a similarly but even more aggressively libertarian ruling,<sup>129</sup> the court struck down an SEC regulation,<sup>130</sup> mandated -- not merely authorized -- by the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>131</sup> which was designed to require disclosure of the origin of “conflict minerals.”<sup>132</sup> The specific goal of the statute is to require disclosure of materials that come from the Democratic Republic of Congo.<sup>133</sup> The National Association of Manufacturers challenged the requirement that an issuer describe its products as not “DRC conflict free” in the report it files with the Commission and must post on its website. Burdens on commercial speech are ordinarily given “intermediate scrutiny.”<sup>134</sup> In striking down the implementing regulation, the court seemed to apply something close to strict scrutiny, even though the disclosure requirements involved mere matters of fact, and nothing graphic. Its chief objection was that the SEC had not provided “evidence that less restrictive means would fail.”<sup>135</sup>

What the court sought was not “the ‘conflict free’ description the statute and rule require,” but instead a looser legal regime, in which “issuers could use their own language to describe their products, or the government could compile its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit to the Commission.”<sup>136</sup> Under one version of this regime, the SEC would not regulate speech, but would compile its own information about affiliated products, and make the resulting list available to consumers and investors. In the court’s judgment, this approach could be equally effective, and indeed “a centralized list compiled by the Commission in one place may even be more convenient or trustworthy to investors and consumers.”<sup>137</sup> What the court required was “evidence” that the alternative would not work. In the process, the court objected that the “label ‘conflict free’ is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups.”<sup>138</sup>

In general, it is certainly reasonable to ask for evidence, and intermediate scrutiny can be read to require it. But in this context, what would such evidence look like? The scheme of

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<sup>129</sup> Conflict Minerals Case, 2014 WL 1408274. (The case is also titled National Association of Manufacturers v. SEC, F.3d (April 14, 2013), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/D3B5DAF947A03F2785257CBA0053AEF8/\\$file/13-5252-1488184.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/D3B5DAF947A03F2785257CBA0053AEF8/$file/13-5252-1488184.pdf))

<sup>130</sup> Conflict Minerals, 77 Fed.Reg. 56,274, 56,277–78 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p–1, 249b.400).

<sup>131</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd–Frank”), Pub.L. No. 111–203, § 1502, 124 Stat. 1376, 2213–18 (codified at 15 U.S.C. §§ 78m(p), 78m note (“Conflict Minerals”).

<sup>132</sup> Conflict Minerals Case, 2014 WL 1408274, at \*8–11.

<sup>133</sup> See Id. at \*1.

<sup>134</sup> See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 563–66 (1980).

<sup>135</sup> Conflict Minerals Case, 2014 WL 1408274, at \*10.

<sup>136</sup> Id. at \*11.

<sup>137</sup> See Id.

<sup>138</sup> See Id. at \*7; see also Id. at \*11 (“The Commission has failed to explain why (much less provide evidence that) [these] intuitive alternatives to regulating speech would be any less effective.”).



regulation involved a novel factual setting rife with uncertainty,<sup>139</sup> in which a demand for proof necessarily dooms the regulation. Under such conditions, Congress thought that it would be appropriate, and simplest and most effective, to require companies to make the relevant disclosure, perhaps on the entirely reasonable theory that such disclosure would be both highly credible and easily accessible, as government disclosure might not be. The intrusion on the companies' legitimate interests would be minimal<sup>140</sup> – at least as minimal as in the context of nongraphic, and constitutionally acceptable, warnings on cigarette packages. On the court's own logic, it would not be much of a stretch to suggest that those very warnings violate the first amendment.

These are first amendment cases, to be sure, but they belong squarely in the world of (libertarian) administrative law, because they raise grave questions about compulsory disclosure, which is an increasingly popular (and minimally intrusive) regulatory tool. One of the ironies of these decisions is that they suggest that the court will use constitutional artillery against disclosure requirements, while having to resort to more modest sub-constitutional principles to strike down mandates and bans. In any case, the libertarian underpinnings of the relevant decisions are unmistakable. These “free speech” decisions use a form of aggressive review of administrators' causal and evidentiary judgments. Such an approach is, plausibly, a substitute for grounds of review -- such as substantive due process protection of property rights, or stringent arbitrariness review under the APA -- that are either off-limits in the current constitutional regime, or else far more difficult to justify, as we will discuss when we examine the Circuit's recent jurisprudence on arbitrariness.

### C. Interpretive Rules

The Administrative Procedure Act recognizes the existence of two kinds of rules: legislative rules, which are generally a product of formal (“on the record”) or informal (not “on the record”) rulemaking processes, and interpretive rules, which agencies may issue without invoking such processes.<sup>141</sup> If an agency wishes to publish an interpretive rule tomorrow, offering its understanding of what its organic statute or its own prior legislative rule means, it is entitled to do so (although there is a separate question whether that rule will receive the deference accorded to legislative rules under Chevron, some other kind of deference, or no deference at all).<sup>142</sup> It is agreed that agencies cannot change legislative rules simply by issuing

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<sup>139</sup> Dodd-Frank, § 1502 (characterizing the “emergency humanitarian situation” in the Congo as one of “extreme levels of violence”).

<sup>140</sup> See Conflict Minerals Case, 2014 WL 1408274, at \*11.

<sup>141</sup> See 5 U.S.C. § 553. Where “good cause” or certain other exceptions are present, agencies may issue legislative rules without formal or informal rulemaking process. See Id. at § 553(a)-(b).

<sup>142</sup> Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)) (interpretative rule interpreting the agency's own regulations is “controlling unless plainly erroneous or inconsistent with the regulation”); Gonzales v. Oregon, 546 U.S. 243, 255-69 (2006) (interpretative rule, which interprets a regulation that merely restates the terms of a statute, and that was not promulgated in exercise of Congressionally delegated authority, is entitled to Skidmore deference).

interpretive rules; any such change must be preceded by some kind of process (typically notice-and-comment).<sup>143</sup> On these questions, the APA is straightforward.

But what if an agency rescinds an interpretive rule and replaces it with a new interpretive rule? Suppose that the Department of Labor issues a legislative rule at Time 1 (say, 1999), then issues an interpretive rule at Time 2 (say, 2008) to clarify its understanding of its own prior legislative rule. Then at Time 3 (say, 2015), the Department rescinds the old interpretation and issues a new interpretive rule, perhaps reflecting changed circumstances, perhaps reflecting a new assessment of relevant facts, perhaps reflecting the values of a new Administration. Must the new interpretive rule be preceded by some kind of APA process?

The correct answer is straightforwardly “no.” The APA does not require any such process. It authorizes agencies to issue interpretive rules immediately and without notice-and-comment or any other kind of process.<sup>144</sup> It is hard to imagine more explicit text than §553(b)(3)(A), which states that “this subsection” -- i.e. the requirement of notice-and-comment rulemaking -- “does not apply - (A) to interpretative rules....”<sup>145</sup> If courts required a notice-and-comment process for interpretive rules that revise previous interpretive rules, they would be imposing a procedural requirement beyond those contained in the APA – a clear violation of the restrictions explicitly laid down in Vermont Yankee.

Nonetheless, the DC Circuit has spoken unambiguously: Agencies must use notice-and-comment procedures in order to change interpretive rules that construe the agency’s own prior legislative rules, at least so long as the agency previously took a definitive position.<sup>146</sup> In Paralyzed Veterans of America v. D.C. Arena L.P.,<sup>147</sup> the court concluded that so long as the original interpretive rule was “authoritatively adopted,”<sup>148</sup> the agency could not change it without a full notice-and-comment process.<sup>149</sup> The court squarely rejected the government’s argument that “an agency is completely free to change its interpretation of an ambiguous regulation so long as the regulation reasonably will bear the second interpretation.”<sup>150</sup>

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<sup>143</sup> See, e.g., Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 494 (D.C. Cir. 2010) (“If the rule cannot fairly be seen as interpreting a statute or a regulation, and if . . . it is enforced, the rule is not an interpretive rule exempt from notice-and-comment rulemaking.”)

<sup>144</sup> See 5 U.S.C. § 553(b)(3)(A).

<sup>145</sup> Id.

<sup>146</sup> The decisions seem to say, in dictum, that the logic does not extend to interpretive rules that construe the underlying statute itself, rather than a prior legislative rule. See, e.g., Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A., 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute”). It is not clear, however, why the logic should stop short in this manner, and the issue has not been squarely presented.

<sup>147</sup> 117 F.3d 579 (D.C. Cir. 1997).

<sup>148</sup> Id. at 587.

<sup>149</sup> Id. at 586 (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”).

<sup>150</sup> Id. at 586. The court went on to uphold the interpretation because it was not inconsistent with any prior interpretation. See Id. at 588. Although on one view that makes the announced rule dictum, on another

The court has asserted the basic principle in a series of cases, and after a brief wobble has actually reaffirmed and strengthened the principle in an important recent decision. The wobble occurred in 2009, when the court gave an apparent signal that it would at least qualify the principle, suggesting the possibility that those who would invoke Paralyzed Veterans would have to show that significant reliance interests were at stake.<sup>151</sup> With this signal, the court indicated that a showing of reliance interests might amount to a separate requirement, independent of the requirement that the original interpretive rule be definitive.<sup>152</sup> But in 2013, in Mortgage Bankers Association v. Harris,<sup>153</sup> the court unambiguously reaffirmed the Paralyzed Veterans principle, ruling that definitiveness is the sole requirement, and that reliance is relevant only insofar as it might inform the question of definitiveness.<sup>154</sup>

Mortgage Bankers invalidated an interpretive rule from the Obama Administration, which would have expressed a more expansive view of the coverage of the Fair Labor Standards Act than had been announced by the Bush Administration.<sup>155</sup> The court stated the rule plainly: “Once a court has classified an agency interpretation as such, it cannot be significantly revised without notice and comment rulemaking.”<sup>156</sup> And in explaining the practical effect of that rule, the court said that it “may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance.”<sup>157</sup> Similarly, in an earlier case in the sequence, the court said that “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”<sup>158</sup>

In terms of standard legal sources, the court’s approach is exceedingly difficult to defend. It is question-begging to say that in such situations, agencies are attempting to “circumvent notice and comment requirements”; the question is whether there are such requirements when agencies change their interpretive rules, and the answer is that there aren’t. The court did refer to “the belief that a definitive interpretation is so closely intertwined with the regulation that a

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view it does not; and in any event the court has applied the rule in a number of later cases. See, e.g., Alaska Prof’l Hunters, 177 F.3d at 1033-36.

<sup>151</sup> MetWest Inc. v. Sec’y of Labor, 560 F.3d 506, 511 & n.4 (D.C. Cir. 2009).

<sup>152</sup> See Id. at 511 (“A fundamental rationale of Alaska Professional Hunters was the affected parties’ substantial and justifiable reliance on a well-established agency interpretation.”); Id. at 511 n.4 (“This is a crucial part of the analysis. To ignore it is to misunderstand Alaska Professional Hunters . . .”).

<sup>153</sup> 720 F.3d 966 (D.C. Cir. 2013), cert. granted sub nom. Perez v. Mortgage Bankers Ass’n, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1041), and Nickols v. Mortgage Bankers Ass’n, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1052). One of us (Vermeule) is a signatory to an amicus brief, on behalf of 72 administrative law scholars, in support of the certiorari petition in the case. See Brief for Administrative Law Scholars as Amici Curiae Supporting Petitioners, Perez v. Mortgage Bankers Ass’n, -- S. Ct. -- (2013) (Nos. 13-1041, 13-1052), 2014 WL 1275189.

<sup>154</sup> See Mortgage Bankers, 720 F.3d at 970.

<sup>155</sup> See Id. at 968.

<sup>156</sup> Id. at 971.

<sup>157</sup> Id. at 969 n.4.

<sup>158</sup> Alaska Prof’l Hunters, 177 F.3d at 1034.

significant change to the former constitutes a repeal or amendment of the latter.”<sup>159</sup> But that belief is wrong. An interpretation issued at Time 1 can be definitive, in the (limited) sense that it certainly reflects the agency’s current considered view, while also lacking the force of law (as interpretive rules do), and without becoming merged or intertwined with the underlying regulation -- a mystical notion in any event. Likewise with the notion that the revised interpretation “in effect” amends the underlying legislative rule -- a notion that collapses the APA’s clear distinction between rulemaking and rule-interpreting.<sup>160</sup>

There is an analogy here to the Chevron doctrine,<sup>161</sup> where a recurring question has been whether agencies’ initial interpretations of statutes are frozen, or instead may be changed by subsequent interpretations, and if so by what procedure. In that setting, recent decisions of the Court have been emphatic, and have settled the issue: new agency interpretations are not in any way disfavored, and no extra burdens of justification are placed on those interpretations. In Brand X,<sup>162</sup> the Court held not only that agencies may freely change their interpretations as far as Chevron is concerned, but also that those new interpretations will oust prior contrary judicial interpretations, so long as the relevant statutes contains a gap or ambiguity.<sup>163</sup> And in FCC v. Fox,<sup>164</sup> the Court rejected the notion that arbitrariness review requires agencies to give special additional justifications for a change of interpretation, over and above the baseline obligation to justify the new interpretation itself.<sup>165</sup> The doctrinal context of Paralyzed Veterans and Mortgage Bankers v. Harris is slightly different, of course, but the larger point is that the D.C. Circuit’s law-freezing approach is not in step with the underlying premises of the Court’s emphatic recent pronouncements.

In this light, the Paralyzed Veterans rule is best seen as a form of federal common law that goes beyond, or that is even contrary to, the Supreme Court’s own decisions – as the Court will have an opportunity to make perfectly clear when it takes up Mortgage Bankers next Term. The rule is a throwback to the era before Vermont Yankee, in which lower courts, and above all

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<sup>159</sup> Mortgage Bankers, 720 F.3d at 969 n.3.

<sup>160</sup> In Alaska Prof’l Hunters, 177 F.3d at 1034, the panel seemed to argue that because the APA’s definition of rulemaking includes agency action that “modifies” a rule, see 5 U.S.C. 551(5), it follows that “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.” This too is question-begging, however; the court is assuming the conclusion by saying that the revised interpretation is in effect an amendment. As far as the APA is concerned, it is a revised interpretation, and not an amendment at all. The court seems to be confusing two ideas: (1) an interpretation is “definitive” in the sense that the agency is committed to it; (2) an interpretation is “definitive” in the sense that it has the force of law. An interpretive rule can lawfully be definitive in the former sense without becoming a legislative rule (which must be preceded by notice-and-comment).

<sup>161</sup> Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

<sup>162</sup> Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005).

<sup>163</sup> See Id. at 982.

<sup>164</sup> F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

<sup>165</sup> Id. at 514.

the DC Circuit, developed constraints on agency action that had little or nothing to do with the APA and far more to do with the courts' own judgments about appropriate restrictions.

What underlies that approach? What is motivating it? We cannot say that the answer is necessarily libertarian at a conceptual level. In the abstract, the Paralyzed Veterans rule has a degree of neutrality. If, for example, the Clinton Administration issued an expansive interpretation of the Fair Labor Standards Act, the Bush Administration would be forbidden to change it without notice and comment. But there is nonetheless a clear connection with libertarian principles. Largely out of solicitude for the reliance interests of regulated entities, who often have the most at stake when interpretive rules are changed, the court seems to be attempting to promote predictability and consistency on the part of agencies, prompting the court to impose on agencies a kind of stare decisis principle, even for their own nonbinding interpretations. The idea seems to be that because agencies exercise discretionary power, and are vulnerable to the power of well-organized private groups (the public choice problem), agency interpretations must be taken as binding at least on agencies themselves, until they are changed through notice and comment procedures. Though reliance on the part of the regulated class is not an independent requirement, it does seem to drive the court's reasoning, as indicated that its suggestion that "regulated entities are unlikely to substantially — and often cannot be said to justifiably — rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation," and hence "significant reliance functions as a rough proxy for definitiveness."<sup>166</sup>

As a matter of doctrine, this reasoning is a bit of a mess. The court is conflating the issue of reliance on interpretive rules with the separate question whether the rule is "definitive." The APA does require that so-called "legislative" rules -- which if valid have the force of law and thus bind both the agency and all the world -- must go through notice and comment procedures. But it expressly exempts "interpretative" rules from this requirement,<sup>167</sup> and any rule that counts as interpretive may be changed without notice and comment, as far as the APA is concerned. There is an elaborate body of law that sorts legislative rules from interpretive rules,<sup>168</sup> but that body of law was agreed by all concerned to be irrelevant in these cases; the court's position is not that the relevant rule was actually legislative.<sup>169</sup> Rather the court's position is that even though the rule is concededly interpretive, it may be changed only through notice-and-comment procedures -- an additional, judge-made requirement that the APA nowhere contains.

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<sup>166</sup> Mortgage Bankers, 720 F.3d at 970.

<sup>167</sup> 5 U.S.C. § 553(b)(3)(A).

<sup>168</sup> See, e.g., Am. Min. Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (four-part test for distinguishing legislative from interpretative rules); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045-46 (D.C. Cir. 1987); Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 208-09 (4th Cir. 1989); Hector v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996).

<sup>169</sup> See, e.g., Paralyzed Veterans, 117 F.3d at 587-88 (characterizing the analysis of whether the rule was a legislative rule as "independent" of the analysis of whether the change in interpretation required notice and comment).

Furthermore, the court failed to recognize that reliance and its reasonableness are at least partly endogenous – products of the legal rules themselves. Knowing that interpretive rules need not be changed by notice-and-comment procedures, regulated entities should discount their reliance accordingly. If they do not, it is unclear why their unjustified reliance ought to constrain the agency’s legal choices. What counts as justified reliance is ultimately itself an endogenous product of the law, at least in part, rather than something that just happens extra-legally, especially when the regulated parties are legally sophisticated firms.

The most promising justification for the court’s conclusion might be that it is arbitrary and capricious to change a reliance-inducing interpretive rule without full notice and comment. Perhaps agencies act without rational foundation when they casually, without rigorous process, change interpretations on which regulated entities have (justifiably?) relied. But there are two difficulties with this attempt to justify the court’s approach, even apart from the issue of the endogeneity of reliance. One is that the court nowhere articulates an arbitrariness rationale for its rule -- perhaps because such a rationale implies that agencies need only give an adequate reason for refusing to use notice and comment when changing an interpretive rule. The court, of course, wants to impose a mandatory procedural requirement of notice and comment, not a mere obligation to give reasons for the agency’s procedural choices. Second, and related no doubt, agencies will often have perfectly valid reasons to decline to use notice and comment to change interpretive rules. Precisely because those rules are not legally binding, agencies may see the benefits of additional procedures as low, while the time and cost of a notice and comment proceeding are frequently nontrivial. While the adequacy of these agency justifications cannot be evaluated in the abstract, they are quite likely to be sufficient in many cases.

The APA does not require agencies to use notice and comment to alter interpretive rules, whether or not they are definitive (and whether or not they induce reliance). Nor could the court possibly say that non-definitive interpretive rules could be changed only through notice and comment procedures. Any such rules should count as lawful interpretive rules or perhaps as general policy statements, lacking any kind of binding effect. No one argues that general policy statements cannot be altered in the absence of notice and comment. The court must be insisting that regulated entities can substantially and justifiably rely on definitive interpretations, even if those interpretations lack the force of law. But if this is true, it is only because the court has so held, in a bootstrapped doctrinal development that can be fairly described as lacking legal foundations.

#### **D. Arbitrariness Review**

In the era of progressive administrative law that pre-dated, and provoked, Vermont Yankee, certain agencies were highly vulnerable. Chief among these was the Nuclear Regulatory Commission (née the Atomic Energy Commission), which became a punching-bag for judges on the D.C. Circuit concerned about the health and environmental risks of nuclear power, and

convinced that the congressionally-specified procedures for NRC rulemaking offered inadequate protection from those risks.<sup>170</sup> The Supreme Court's rebuke to the D.C. Circuit in Vermont Yankee made both a general point that judges lack authority to require agencies to employ procedures over and above the procedures mandated by constitutional or statutory command,<sup>171</sup> and also a more specific point: that the Circuit's systematically skeptical stance towards nuclear power was unacceptable, in light of Congress' consistent policy and contrary instructions.<sup>172</sup>

Today's disfavored agency is the Securities and Exchange Commission. Straightforwardly, a series of recent decisions from the D.C. Circuit,<sup>173</sup> culminating in the Business Roundtable case,<sup>174</sup> suggest that the SEC ought not to be able to institute new regulation of securities markets and corporate affairs unless the Commission provides either a full quantified cost-benefit analysis demonstrating that the regulation is net-beneficial, or else explains why quantification is impossible.<sup>175</sup> Moreover, the lower court has questioned whether the SEC may regulate in the face of "mixed evidence" about the benefits of regulation.<sup>176</sup> To be sure, the cases are not uniform. A recent decision, involving not the SEC but the CFTC, seemingly reins in the burgeoning caselaw a bit,<sup>177</sup> perhaps in reaction to the widespread criticism the court has received for Business Roundtable.<sup>178</sup> But the decisions involving the NRC (AEC) were hardly uniform either,<sup>179</sup> and if anything, the SEC may well have lost cases more consistently than did the NRC. Indeed then-Professor Scalia, writing in the late 1970s, suggested that the Circuit had tacked back and forth in its NRC decisions, delivering mixed results and

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<sup>170</sup> See, e.g., Natural Res. Def. Council, Inc. v. NRC, 547 F.2d 633, 653 (D.C. Cir. 1976), rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

<sup>171</sup> Vermont Yankee, 435 U.S. at 524.

<sup>172</sup> Id. at 558 ("The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action.")

<sup>173</sup> Chamber of Commerce of U.S. v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); see also John C. Coates, IV, Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications (Eur. Corp. Governance Inst., Law Working Paper No. 234, 2014), available at <http://ssrn.com/abstract=2375396>.

<sup>174</sup> Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

<sup>175</sup> See Id. at 1148-49.

<sup>176</sup> See Id. at 1151.

<sup>177</sup> Inv. Co. Inst. v. CFTC, 720 F.3d 370 (D.C. Cir. 2013).

<sup>178</sup> See, e.g., Grant M. Hayden & Matthew T. Bodie, The Bizarre Law & Economics of Business Roundtable v. SEC, 38 J. CORP. L. 1, 2 (2012) (criticizing Business Roundtable as a judicial "misapplication of law and economic principles"); Case Comment, D.C. Circuit Finds Sec Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis: Business Roundtable v. SEC, 125 HARV. L. REV. 1088, 1095 (2012) (criticizing Business Roundtable as "impos[ing] unattainable standards that bar agency action"); Bruce Kraus & Connor Raso, Rational Boundaries for Sec Cost-Benefit Analysis, 30 YALE J. REG. 289, 293 (2013) (calling Business Roundtable's criticism of SEC's empirical economic analysis "unfounded").

<sup>179</sup> Compare, e.g., Citizens for Safe Power, Inc. v. Nuclear Regulatory Comm'n, 524 F.2d 1291, 1301 (D.C. Cir. 1975) (upholding NRC's issuance of an operating license for a nuclear plant and not requiring the agency to implement additional procedures), with NRDC v. NRC, 547 F.2d at 653 (reversing NRC's issuance of an operating license and requiring the agency to implement additional procedures).

ambiguous rationales, in order to present a smaller target for intervention by the Supreme Court.<sup>180</sup>

The relevant line of decisions began, at the latest, with Chamber of Commerce v. SEC<sup>181</sup> in 2005. The SEC required that “in order to engage in certain transactions otherwise prohibited by the [Investment Company Act], an investment company — commonly referred to as a mutual fund — must have a board (1) with no less than 75% independent directors and (2) an independent chairman.”<sup>182</sup> The panel -- in an opinion by Judge Douglas Ginsburg, whose views on the “Constitution in Exile” we have seen earlier, and who would later author Business Roundtable -- invalidated the regulation on the ground that the agency had declared certain costs unquantifiable. The agency had discussed the costs, explained the attendant uncertainty, and stated that it had no reliable basis for estimating the costs quantitatively, but decided to proceed on the basis of an overall judgment that the regulation would do more good than harm.<sup>183</sup> The panel, in an ambiguous discussion, seemed to suggest that the agency had a statutory duty to make “tough choices” by “hazarding a guess”<sup>184</sup> and “do[ing] what it can.”<sup>185</sup> This seemed to require a quantified guesstimate, insofar as feasible.<sup>186</sup> The legal basis for this judicially-imposed requirement, however, was left unstated. As we will see shortly, Chamber of Commerce v. SEC was a first effort in the direction of the obligation eventually imposed, in a more general form, by Business Roundtable -- a presumptive agency obligation to quantify costs and benefits insofar as possible.

Also aggressive, but with somewhat different concerns, was the decision in American Equity Investment Life Insurance Co. v. SEC,<sup>187</sup> decided in 2010 and written by Judge Sentelle. The panel invalidated the SEC’s attempt to define an “annuity contract” for purposes of the federal securities laws in a way that extended the protections of those laws; the panel reasoned that the agency had failed adequately to consider the effects on “efficiency, competition, and capital formation.”<sup>188</sup> The panel’s principal rationale, as pertinent here, was that the SEC had failed to consider whether there were sufficient protections for investors under the extant state-law regime, and had thus failed to show that new regulation was necessary.<sup>189</sup> The relevant statutes, however, said nothing at all to suggest that the SEC had to consider whether -- assuming

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<sup>180</sup> See Scalia, *supra* note 2, at 372 (“The pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit’s principle of APA hybrid rulemaking so clearly and authoritatively emerged had the effect, if not the purpose, of assuring compliance below while avoiding accountability above”); see *Id.* at 372-75.

<sup>181</sup> 412 F.3d 133 (D.C. Cir. 2005).

<sup>182</sup> *Id.* at 136.

<sup>183</sup> See *Id.* at 142-44.

<sup>184</sup> *Id.* at 143.

<sup>185</sup> *Id.* at 144.

<sup>186</sup> See Coates, *supra* note 173, at 24-26.

<sup>187</sup> 613 F.3d 166 (D.C. Cir. 2010).

<sup>188</sup> *Id.* at 167-68.

<sup>189</sup> See *Id.* at 178.



the regulation were otherwise justified in light of “efficiency” and “competition” -- state law was already sufficient.<sup>190</sup> The panel injected a note of federalism into statutes that had seemed to have other concerns altogether.

Business Roundtable, decided in 2011, went farther than any of its predecessors by imposing a presumptive obligation to perform quantified cost-benefit analysis. The case involved the question of “proxy access” in corporate shareholder voting -- whether the proxy materials sent to shareholder-voters by publicly traded firms must include nominees of the shareholders, or may instead be confined to the slate of nominees designated by the incumbent directors.<sup>191</sup> In a 2009 rulemaking, the SEC elected to require shareholder proxy access, and accompanied its decision with a lengthy cost-benefit analysis that considered effects on efficiency, competition and capital formation.<sup>192</sup> Not all of the elements of the analysis were quantified, however; the SEC clearly noted that some of those elements were uncertain, in the sense that available information did not suffice to conduct a quantified cost-benefit analysis.<sup>193</sup> As to those issues, the SEC simply discussed the relevant considerations and resolved the issues through an exercise of expert judgment about the balance of advantages. It is worth quoting a specimen of the SEC’s own words, which do not appear in the Business Roundtable opinion:

We also recognize the possibility that certain quantifiable benefits for shareholders, such as a nominating shareholder’s or group’s savings in the direct costs of printing and mailing proxy materials, may be less than the quantifiable costs for a company subject to the new rules. We note, however, that the benefits of the new rules are not limited to those that are quantifiable (such as the direct savings in printing and mailing costs) and instead include benefits that are not as easily quantifiable (such as the possibility of greater shareholder participation and communication in the director nomination process), as discussed below. We believe that these benefits, collectively, justify the costs of the new rules.<sup>194</sup>

Along the way, the SEC discussed the state of the empirical evidence, examining dozens of studies in peer-reviewed journals of economics and finance.<sup>195</sup> It concluded that the evidence was mixed, that a number of the studies had methodological flaws, and that uncertainty afflicted

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<sup>190</sup> The statute that the court relied on to strike down the SEC Rule, see *Id.* at 177 (citing §2(b) of the amended Securities Act of 1933, 15 U.S.C. § 77b(b)), requires the SEC to consider “whether the action will promote efficiency, competition, and capital formation,” but makes no mention of existing state law.

<sup>191</sup> See 647 F.3d at 261-63.

<sup>192</sup> Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29024 (proposed June 18, 2009). The final rule is Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56668 (Sept. 16, 2010).

<sup>193</sup> See Business Roundtable, 647 F.3d at 1149 (citing 75 Fed. Reg. 56,761/1).

<sup>194</sup> 75 Fed. Reg. 56755/2-3 (emphasis added).

<sup>195</sup> See generally 75 Fed. Reg. 56753 et seq. (discussing the agency’s cost-benefit analysis); see also Brief of Respondent, Business Roundtable, 647 F.3d 1144 (No. 10–1305), 2011 WL 2014799, at \*13 (summarizing studies consulted by the agency).

the whole topic.<sup>196</sup> Yet the Commission ultimately found most persuasive a cluster of studies suggesting that proxy access rules would discipline incumbent management and thus enhance shareholder value.<sup>197</sup>

On the petition for review, the challengers, the Business Roundtable, ignored some of the relevant empirical issues and focused on a series of other claims<sup>198</sup> -- probably in the belief that on any ordinary approach to burdens of proof and standards of review in administrative law, the SEC must prevail, given the uncertainty and conflicting state of the evidence. After all, the Supreme Court has been very clear that lower courts are to afford maximum deference to agencies' expert judgments on questions at the research frontier, questions as to which scientific methods are unable to provide conclusive evidence one way or another.<sup>199</sup> In 2009, two years before Business Roundtable, FCC v. Fox had warned that "[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained....It is something else to insist upon obtaining the unobtainable."<sup>200</sup>

The D.C. Circuit panel granted the petition, scrutinized the evidence in some detail, and invalidated the Commission's conclusions on the basis of that evidence. As to the major claimed benefit of the proxy access rules -- that the anticipated threat from shareholder nominees would discipline incumbent directors and improve their performance -- the panel held that the Commission had failed to comply with its statutory obligation to consider the rule's effect on "efficiency, competition, and capital formation" and had acted arbitrarily by failing "adequately to assess the economic effects of a new rule."<sup>201</sup> But why was the Commission's assessment inadequate? As we shall see, the panel offered numerous answers, but at bottom, it had two basic objections. One was that the agency was obligated either to provide a quantitative cost-benefit analysis or to explain why doing so would be infeasible.<sup>202</sup> The other was that the evidence did not suffice to support the Commission's conclusion that the rule's benefits would materialize and would outweigh its costs.<sup>203</sup> Either holding would, alone, suffice for reversal.

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<sup>196</sup> See Business Roundtable, 647 F.3d at 1151.

<sup>197</sup> See Id. (citing 75 Fed. Reg. at 56,762 & n. 921).

<sup>198</sup> See Brief of Petitioners, Business Roundtable, 647 F.3d 1144 (No. 10–1305), at \*28-29 (summarizing petitioners' arguments on appeal, but not contesting that the agency's reliance on particular empirical studies was in violation of law).

<sup>199</sup> Baltimore Gas & Elec., 462 U.S. at 103. More generally, under State Farm, a rulemaking is arbitrary and capricious if, among other things, it is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm), 463 U.S. 29, 43 (1983). This implies that for questions on which experts differ, the agency is permitted to select any reasonable viewpoint, so long as it articulates as "rational connection between the facts found and the choice made." Id. at 43; see also Id. at 52 ("It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.").

<sup>200</sup> FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

<sup>201</sup> Business Roundtable, 647 F.3d at 1148.

<sup>202</sup> Id. at 1149.

<sup>203</sup> See Id. (rebuking the agency for "neglect[ing] to support its predictive judgments"); Id. at 1151 (criticizing the agency's use of "mixed evidence").

[At this point, Sunstein and Vermeule have somewhat different views about the Business Roundtable decision, and so we must present those separately. The authors agree that the decision was a form of libertarian administrative law and that the court overreached. But they differ about the authority of courts to require agencies to engage in quantified cost-benefit analysis.]

*Sunstein:*

As a matter of policy, there are reasonable objections to the proxy access rule. The evidence is admittedly uncertain, and the SEC could have concluded that the rule was not, on the basis of that evidence, adequately justified. But there are also reasonable arguments on behalf of the rule. In these circumstances, the Business Roundtable case represents an excessively aggressive exercise of the power of judicial review, with undue second-guessing of the administrative record.

As part of that second-guessing, the court appeared to conclude that the SEC’s obligation to consider the effects of a rule on “efficiency, competition, and capital formation” effectively required it to conduct, and make transparent, some form of quantitative cost-benefit analysis.<sup>204</sup> On its face, the statute does no such thing. The reason is that the agency could consider those effects without conducting any such analysis. At the very least, a mandate to consider the effects of a regulation on “efficiency, competition, and capital formation” does not, by itself, unambiguously require formal analysis of benefits. Indeed, it is not even clear that to show the requisite consideration, the agency must provide a quantitative analysis of costs.

In these circumstances, the best justification for the court’s general approach might take the following form. Because the agency is required to consider the effects of a rule on “efficiency, competition, and capital formation,”<sup>205</sup> it would be arbitrary, within the meaning of the APA, for the agency to proceed if those effects are both adverse and significant, at least if they are not justified by compensating benefits. It would follow that if a rule has net costs, or no net benefits, or if the SEC cannot show that a rule will have net benefits, the court should invalidate that rule as arbitrary. Indeed, it would generally seem arbitrary for an agency to issue a rule that has net costs (or no net benefits), at least unless a statute requires it to do so. To be sure, this argument is not self-evidently correct. Plausible questions might be raised by an effort to link arbitrariness review to the statutory requirement to consider the relevant effects, and thus to impose a requirement of cost-benefit balancing (subject of course to a feasibility constraint, where quantification is not possible). But as a matter of principle, that approach has some appeal, and it would not be beyond the pale.

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<sup>204</sup> *Id.* at 1148-49.

<sup>205</sup> 15 U.S.C. § 78c(f).

The real problem with the court’s approach lies in its fly-specking of the administrative record. Notably, the court appears to have invalidated the regulation on at least eight grounds: (1) the agency did not adequately explain its conclusion (relevant to its assessment of costs) that directors might not choose to oppose shareholder nominees; (2) the agency did not have adequate evidence to support its conclusion that the rule would improve board performance and increase shareholder value; (3) the agency unreasonably discounted the costs, but not the benefits, of the rule by reference to the traditional state law right to elect directors; (4) the agency did not adequately respond to comments suggesting that special interests, including unions and state and local governments, would use the rule to pursue self-interested objectives, rather than the interests of shareholders; (5) the agency did not adequately calculate the effects of the rule on the total number of election contests; (6) the agency did not adequately explore whether, in view of special statutory requirements, the rule should be applied to investment companies; (7) the agency did not deal adequately with the objection that the rule would impose increased costs on investment companies; and (8) the agency did not adequately address the concern that as applied to investment companies, the rule would have no net benefits.

By invoking these eight separate objections, the court offered what looks far more like a set of comments on a proposed rule than a standard judicial opinion. Moreover, a fair reading of the rule and its underlying rationale suggests that the SEC offered plausible and nonarbitrary (which is not necessarily to say convincing) answers to most, and to perhaps even to all, of those questions. As a matter of standard arbitrariness review, the SEC’s justifications were generally sufficient to survive. With respect to (2), for example – and this was probably the court’s most important holding – the SEC made a reasonable judgment in the face of conflicting and uncertain evidence. (See below for details.) Where an agency has quantified what can be quantified and explained that some factors cannot be quantified, it has not acted arbitrarily, so long as its judgments have factual support and its policy choices are reasonable. As noted, there are plausible policy objections to the SEC’s approach in the case, but with the breadth and sheer number of its holdings, the court exceeded its appropriate role.

*Vermeule:*

To understand the problems with the Business Roundtable opinion, a bit of legal background is necessary. The Commission is subject to the binding legal obligation -- created in 1996 in the National Securities Markets Improvement Act, as a part of the Contract With America -- to consider the effect of its rules on “efficiency, competition, and capital formation.”<sup>206</sup> (Following other commentators,<sup>207</sup> we will call this the “ECCF obligation” for convenience). It is plausible to read this to require the agency to conduct some kind of analysis of how its rules affect efficiency, competition, and capital formation. But there is no reason to

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<sup>206</sup> National Securities Markets Improvement Act, PL 104-290, § 106, 110 Stat. 3416, 3424 (codified at 15 U.S.C. § 77b(b)).

<sup>207</sup> Kraus & Raso, supra note 178, at 292.

read into the ECCF obligation a further, distinct obligation to carry out quantified cost-benefit analysis, even presumptively, as long as doing so is “feasible.”

The ECCF obligation is a standard type of statutory provision, one that identifies “relevant factors” agencies must take into account when making decisions. Were the agency to refuse to take those factors into account, its refusal would not only violate the direct statutory obligation, but would also amount to “arbitrary and capricious” agency action within the meaning of Section 706 of the APA.<sup>208</sup> But the duty to consider the relevant factors, by itself, simply does not impose any obligation to proceed quantitatively, not even as a presumptive matter. It simply does not say that the Commission may only enact a new regulation if it can either show, with quantified cost-benefit analysis, that the benefits exceed the costs, or else explain why quantification is impossible. Congress knows how to require agencies to conduct quantified cost-benefit analysis, and has done so in a number of statutes in express terms, but not in the ECCF provisions.<sup>209</sup> Were Congress to clearly and specifically require monetized cost-benefit analysis, that command would of course prevail, but Congress has not done so in any general way with respect to the SEC.<sup>210</sup>

Nor is there any warrant for reading a presumptive requirement of quantification -- provide quantified cost-benefit analysis or show it to be impossible -- directly into Section 706 of

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<sup>208</sup> See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (failure to consider relevant factors is arbitrary and capricious).

<sup>209</sup> See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(C)(i)(I) (requiring agency findings on “quantifiable and nonquantifiable” health risks and benefits); Unfunded Mandates Reform Act, 2 U.S.C. § 658b(c)(2) (requiring “a qualitative, and if practicable, a quantitative assessment of costs and benefits anticipated from the Federal mandates”); *Id.* at § 1532(a)(2) (requiring “qualitative and quantitative assessment of the anticipated costs and benefits”); Clean Air Act, 42 U.S.C. § 7612 (requiring the agency to “consider the costs, benefits and other effects associated with compliance with each standard issued”). Indeed, Congress can be extremely precise in specifying different forms of cost-benefit analysis within the same statute. For example, the Clean Water Act specifies several forms of cost-benefit analysis. Compare 33 U.S.C. § 1314(b)(1)(B) (requiring “consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved”), with *Id.* at § 1314(b)(4)(B) (requiring “consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived”) (emphasis added), with *Id.* at § 1314(b)(2)(B) (requiring consideration only of “the cost of achieving such effluent reduction,” and not requiring any cost-benefit comparison). Thanks to Jeff Gordon for providing the first two citations. See Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation* 11 n.13 (Colum. L. & Econ. Working Paper No. 464, 2013), available at <http://ssrn.com/abstract=2378562>.

<sup>210</sup> The qualifier “in any general way” is to cover statutes like the Paperwork Reduction Act, Regulatory Flexibility Act, and Congressional Review Act. These require SEC to include some information relevant to quantified cost-benefit analysis in various filings or documents, yet none imposes a general obligation that SEC rulemaking should quantify costs and benefits insofar as possible. See Coates, *supra* note 173, at 20-22. Nor have executive orders done so; as an “independent” agency, the SEC is exempt from the major cost-benefit orders. See Exec. Order No. 12,866 § 3(b); see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1201 (2000) (discussing the history of the executive’s exemption of independents from OIRA review). (The scare quotes around “independent” are explained in Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013); Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013)).

the APA, under the rubric of arbitrary and capricious review. There are two independent problems with such an approach. The first is that it is inconsistent with congressional instructions, rightly understood.<sup>211</sup> Suppose that the agency's organic statutes require consideration of economic factors, but do not require the agency to quantify its consideration of costs and benefits (even presumptively), while other statutes do contain such a requirement. Then it would render Congress' careful calibration of requirements pointless were judges to read the open-ended language of Section 706 to impose a global mandate of quantification or even presumptive quantification. Arbitrariness review is not a license to impose indirectly a set of procedural requirements, like (presumptive) quantification, that Congress refused to impose directly.

The second problem is that a presumptive requirement of quantification is inconsistent with Section 706 itself, and with the approach to judicial review and the judicial role that the APA embodies and presupposes. Arbitrariness review does not permit judges to require agencies to use whatever decision-procedure the judges happen to think is best, declaring all other decision-procedures "irrational." Rather it leaves space for any decision-procedure that can be defended among reasonable professionals, and strictly qualitative cost-benefit analysis surely passes that threshold, given its ubiquity both in policymaking and in life. It is demonstrable that reasonable disagreement flourishes -- both among experts and the interested public generally -- about the superiority of quantified cost-benefit analysis to other decision-procedures; even mainstream proponents of quantified cost-benefit do not usually say that no rational mind could disagree with their views.<sup>212</sup> If that requirement could be imposed under the rubric of 706, then so could the opposite. Judges of a different cast of mind could require agencies to use feasibility analysis instead,<sup>213</sup> perhaps declaring it "arbitrary" and "irrational" to use quantified cost-benefit analysis when values are so obviously incommensurable.<sup>214</sup>

At bottom, quantified cost-benefit analysis is just one decision-procedure among others. But Vermont Yankee holds that judges have no authority to require agencies to impose more or

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<sup>211</sup> There is an open question here whether Chevron deference applies to an agency's interpretation of its organic statute with respect to these issues. After the Court's recent decision in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), the answer should be that Chevron deference does apply. We bracket that issue for purposes of the current discussion, however. In our view, the ECCF obligation, even read de novo and without deference to the agency, does not plausibly impose a presumptive requirement of quantification.

<sup>212</sup> See Matthew D. Adler & Eric A. Posner, Rethinking Cost-Benefit Analysis, 109 YALE L.J. 165, 167 (1999) ("Many law professors, economists, and philosophers believe that CBA does not produce morally relevant information and should not be used in project evaluation. A few commentators argue that the information produced by CBA has some, but limited, relevance."); see also Id. at 170-72 & n.10-18 (discussing the history of cost-benefit analysis and collecting works);

<sup>213</sup> Feasibility studies have been used by many agencies. See, e.g., US DEP'T OF AGRICULTURE RURAL BUSINESS-COOPERATIVE SERVICE, VITAL STEPS: A COOPERATIVE FEASIBILITY STUDY GUIDE (2010), available at <http://www.rurdev.usda.gov/rbs/pub/sr58.pdf>; EPA & US ARMY CORPS OF ENGINEERS, A GUIDE TO DEVELOPING AND DOCUMENTING COST ESTIMATES DURING THE FEASIBILITY STUDY (July 2000), available at <http://www.epa.gov/superfund/policy/remedy/pdfs/finaldoc.pdf>.

<sup>214</sup> See generally FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

different procedures than Congress itself imposed;<sup>215</sup> and the ECCF obligation is, straightforwardly, a mere obligation to consider certain factors. Nor may arbitrariness review be used as a way to smuggle a controversial decision procedure in through the back door and foist it upon agencies. In a 1983 successor case to Vermont Yankee, a case named Baltimore Gas & Electric,<sup>216</sup> the Supreme Court rebuked the D.C. Circuit again, also in the nuclear power setting, for a similar maneuver. We will return to that part of the story shortly. For now, what matters is that Business Roundtable ignored all of these distinctions and problems, and briskly subjected the Commission to the presumptive requirement we have mentioned, demanding quantified cost-benefit analysis or a showing that quantification would be impossible.<sup>217</sup>

*Return to both authors:*

Bracketing the question just discussed, there is another problem: the panel also erred by erecting a legally unfounded burden of proof. The panel had stated in general terms that “the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”<sup>218</sup> But the Commission’s detailed discussion of the peer-reviewed scholarship, its methodological cautions, and its explanation that the relevant rules involved unquantifiable benefits,<sup>219</sup> did provide a legally adequate explanation of the limits of feasible analysis. In the face of the record, the panel had to fall back upon impeaching the Commission’s substantive view of the evidence:

The Commission instead relied exclusively and heavily upon two relatively unpersuasive studies....In view of the admittedly (and at best) "mixed" empirical evidence, we think the Commission has not sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value.<sup>220</sup>

It is not a valid move in American administrative law for judges to decide that peer-reviewed economic studies supporting the agency’s view strike them as “unpersuasive,” or for judges to bar agencies from proceeding in the face of “mixed evidence.” The panel’s discussion is not without ambiguity, but it seems to imply that the antonym of “mixed” evidence is “clear” evidence, so that the Commission would have to give “clear” evidence in support of its views. Analytically, this collapses two distinct administrative-law questions: (1) the standard of proof under which the agency must demonstrate its conclusions (to its own satisfaction), and (2) the

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<sup>215</sup> See Vermont Yankee, 435 U.S. at 524.

<sup>216</sup> Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87 (1983).

<sup>217</sup> 647 F.3d at 1149.

<sup>218</sup> *Id.* at 1148-49.

<sup>219</sup> See generally 75 Fed. Reg. 56753 et seq. (discussing the agency’s detailed cost-benefit analysis).

<sup>220</sup> Business Roundtable, 647 F.3d at 1151 (internal citations omitted).

standard of review under which judges examine the adequacy of the agency's conclusions.<sup>221</sup> Even if "mixed" evidence would not suffice for the former, it may well survive the latter, just as a dubious jury verdict may not be so clearly invalid as to survive the permissive standard for judicial review.

In any event, there is no conceivably valid legal ground for saying that agencies generally, or the Commission in particular, may not regulate because the evidence supporting the benefits of regulation is "mixed." Where predictions are required, evidence is often mixed, and a decision to proceed is not arbitrary for that reason. Ideally, of course, an agency would know both probabilities and expected outcomes. To speak in stylized fashion, it might believe that a regulation is 80 percent likely to produce \$500 million in benefits, and 20 percent likely to produce \$0 in expected benefits; or 50 percent likely to produce \$400 million in benefits, and 50 percent likely to produce \$0 in benefits; or 20 percent likely to produce \$500 million in benefits, and 80 percent likely to produce \$0 in benefits – with expected values, in such cases, of \$400 million, \$200 million, and \$100 million respectively. In all such cases, a judgment in favor of regulation would be acceptable (unless the agency were also required to balance costs, and even then, only if the costs exceeded the benefits). In actual practice, precise assignments are usually not possible, and as a matter of law, a reasoned agency decision in favor of one view, in the face of conflicting evidence, is acceptable.

It is true that an agency might well be deemed arbitrary if it proceeded with a small probability of producing any benefits at all. But there is no constraint on proceeding in the face of "mixed" evidence, either in the statutory ECCF obligation to consider certain economic factors, in the APA burden of proof, or in the APA scheme of reasoned decisionmaking and judicial review for arbitrariness. It is hardly arbitrary for an agency to decide, in the face of uncertainty, that it favors regulation over non-regulation.<sup>222</sup> Although the presence of uncertainty may make such a decision irreducibly arbitrary in a decision-theoretic sense, it is not arbitrary and capricious in a legal sense.<sup>223</sup>

Administrative law has been here before. In the last case of a systematically disfavored agency, the Nuclear Regulatory Commission, the D.C. Circuit shifted its ground after Vermont Yankee. Abandoning the "hybrid proceduralism" that the Supreme Court had so severely rebuked, the lower court bent its efforts to stringent arbitrariness review of NRC decisions, a

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<sup>221</sup> See Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622-23 (1993) ("[A standard of review is] customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof.").

<sup>222</sup> See State Farm, 463 U.S. at 52 ("It is not infrequent that the available data does not settle a regulatory issue and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.").

<sup>223</sup> See Adrian Vermeule, Rationally Arbitrary Decisions (in Administrative Law), J. LEGAL STUD. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2239155](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239155).



course that the Vermont Yankee opinion had left open, perhaps incautiously. Five years later, in 1983, the Court had to step in again to restrain the lower court's interference. In Baltimore Gas & Electric v. NRDC, the issue was whether the NRC could make a "zero-release" assumption about spent nuclear fuel in long-term storage<sup>224</sup> -- in other words, whether the agency could make an optimistic assumption about the effects of nuclear waste policy under irreducible uncertainty, just as the SEC did with respect to the proxy-access rule. The D.C. Circuit had denounced the agency for arbitrariness, on the ground that its zero-release assumption was unsupported.<sup>225</sup> But the Supreme Court was emphatic that when agencies act at the frontiers of knowledge, courts should be extraordinarily reluctant to intervene. "A reviewing court," it said, "must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."<sup>226</sup>

Baltimore Gas & Electric involved natural science, whereas predicting the effects of the proxy-access rule involved economics and social sciences, but this is not a relevant difference, and otherwise the cases are on all fours. An agency acted at the frontiers of the known and the knowable, and the D.C. Circuit -- in a progressive cause in the one case, a libertarian cause in the other -- demanded that the agency supply evidence that it reasonably claimed that it did not have. Administrative law no more tolerates that stance today than it did before.

Most recently, in Investment Company Institute v. CFTC,<sup>227</sup> a panel of the Circuit upheld against arbitrariness challenge a new CFTC rule regarding derivatives trading. The new rule,<sup>228</sup> enacted under the authority of and in the spirit of Dodd-Frank, narrowed the exclusions from the CFTC's regulatory scheme for derivatives trading, bringing "registered investment companies" (mutual funds and others) within the regulatory ambit.<sup>229</sup> The regulated entities would then be subject to data-disclosure obligations and other regulatory programs.<sup>230</sup> Citing Business Roundtable and its predecessors, the regulated entities complained (as relevant here) that the agency had failed to adequately consider the costs and benefits of the rule.<sup>231</sup> The CFTC's organic statute required it to consider the "costs and benefits" of its actions and to "evaluate[]" those costs and benefits in light of, among other factors, "considerations of the efficiency, competitiveness, and financial integrity of futures markets."<sup>232</sup>

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<sup>224</sup> 462 U.S. at 91-92.

<sup>225</sup> Natural Res. Def. Council, Inc. v. U. S. Nuclear Regulatory Comm'n, 685 F.2d 459, 478-85 (D.C. Cir. 1982), rev'd sub nom. Baltimore Gas & Electric, 426 U.S. 87.

<sup>226</sup> Baltimore Gas & Electric, 462 U.S. at 103.

<sup>227</sup> Inv. Co. Inst. v. Commodity Futures Trading Comm'n, 720 F.3d 370 (D.C. Cir. 2013).

<sup>228</sup> Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11,252 (Feb. 24, 2012).

<sup>229</sup> See Investment Company Institute, 720 F.3d at 372-75.

<sup>230</sup> See Id.

<sup>231</sup> Id. at 377.

<sup>232</sup> Id. at 377 (quoting 7 U.S.C.A. § 19(a)).

As in Business Roundtable, a crucial issue involved the nonquantifiable benefits of the regulation. The problem arises in the financial domain when both the regulated behavior and the regulatory responses have a speculative character. When agencies act to prevent a large-scale crisis, and no crisis occurs in some period of reference, was the regulation helpful or useless? And what if anything was the marginal contribution of the particular regulations at issue? These questions could easily be raised with a raised eyebrow and in a pointed way, so as to suggest that the agency had behaved arbitrarily. The issues are likely to have a degree of uncertainty, as the Investment Company Institute panel recognized -- in words that could have been written in Business Roundtable as well:

The appellants further complain that CFTC failed to put a precise number on the benefit of data collection in preventing future financial crises. But the law does not require agencies to measure the immeasurable. CFTC's discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits. See Fox, 556 U.S. at 519, 129 S.Ct. 1800 (holding that agencies are not required to "adduce empirical data that" cannot be obtained). Where Congress has required "rigorous, quantitative economic analysis," it has made that requirement clear in the agency's statute, but it imposed no such requirement here. American Financial Services Ass'n v. FTC, 767 F.2d 957, 986 (D.C.Cir.1985); cf., e.g., 2 U.S.C. § 1532(a) (requiring the agency to "prepare a written statement containing ... a qualitative and quantitative assessment of the anticipated costs and benefits" that includes, among other things, "estimates by the agency of the [rule's] effect on the national economy").<sup>233</sup>

All this is exactly correct under current law. The hard question is what its significance might be. It is simply unclear, too soon to tell, whether Investment Company Institute portends a broader retrenchment in the Circuit, or instead a mere tacking backwards, an instance of *reculer pour mieux sauter*. Investment Company Institute relies, in part, on a putative distinction of Business Roundtable,<sup>234</sup> but we find that distinction less than convincing, and the two cases are inconsistent at a deeper level; Investment Company Institute displays a tolerance of regulation

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<sup>233</sup> Id. at 379. On the general issue of nonquantifiable benefits, see Cass R. Sunstein, The Limits of Quantification, Cal. L. Rev. (forthcoming 2014).

<sup>234</sup> The putative distinction is that in Business Roundtable, the SEC had failed to explain why its new rule was necessary, in light of extant regulation. See Investment Company Institute, 720 F.3d at 378; see also Gordon, supra note 209. This is unconvincing because it is a post hoc redescription of the rationale of Business Roundtable, in which the central point was not regulatory overlap with extant rules, but was instead the SEC's failure either to quantify fully the benefits of its regulation (which was impossible) or to explain why the benefits could not be quantified (which the SEC had actually done, as explained earlier). See Business Roundtable, 647 F.3d at 1148-49, 1149-51; see also Id. at 1154 (holding that because the rule was arbitrary and capricious on its face due to the improper cost-benefit analysis, the rule was "assuredly invalid as applied specifically to investment companies," but then going on to discuss that the rule as applied to investment companies would also be invalid because the SEC failed to explain why the rule was necessary in light of the extant regulation).

under conditions of uncertainty that is entirely foreign to its predecessor. It displays a different “mood.”<sup>235</sup>

But we should not make too much of what is, after all, merely one data point.<sup>236</sup> A striking feature of the progressive administrative law of the D.C. Circuit before Vermont Yankee was that it displayed exactly this quality of tacking, of advances followed by partial retrenchments, of alternative holdings and ambiguous doctrine. Cynics might see such a pattern as a deliberate strategy, on the part of the lower court, to present the smallest possible target for reversal by the Supreme Court – as we have noted, a suggestion offered by then-Professor Scalia about the D.C. Circuit’s ambiguous caselaw before Vermont Yankee.<sup>237</sup> (Scalia acutely observed that “these same devices that inhibit Supreme Court review facilitate the development of inconsistency among the various panels of the D.C. Circuit itself.”<sup>238</sup>) But we favor a different explanation, which is structural rather than strategic: It is in the nature of multimember courts that no course of action will be followed with iron consistency,<sup>239</sup> because of the vagaries of voting, the aggregation of voting, and the presentation of cases. Whichever explanation one prefers, it is premature to decide that the judges who power libertarian administrative law have changed course.

## E. Standing

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<sup>235</sup> Cf. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 487 (1951) (Frankfurter, J.) (suggesting that with the enactment of the “substantial evidence” test, Congress had expressed a “mood”).

<sup>236</sup> Another recent data point is Nat’l Ass’n of Mfrs. v. S.E.C., No. 13-5252, 2014 WL 1408274, -- F.3d -- (D.C. Cir. Apr. 14, 2014), the “conflict minerals” decision that invalidated a congressionally-mandated SEC disclosure regulation on commercial speech grounds. See supra text accompanying notes 129-140. Before reaching the commercial speech issue, the panel – Judge Sentelle writing for himself and Judge Randolph, with a partial concurrence by Judge Srinivasan -- upheld the SEC rule against arbitrariness attack. Id. at \*3-8. The opinion cited Investment Company Institute for the proposition that “[a]n agency is not required ‘to measure the immeasurable,’ and need not conduct a ‘rigorous, quantitative economic analysis’ unless the statute explicitly directs it to do so.” Id. at \*8. On several grounds, however, it is unclear whether this portends a retrenchment. First, the panel did after all invalidate the regulation on constitutional grounds, Id. at \*8-11, so the decision may only portend that libertarian administrative law is moving into an even more aggressive phase, in which the label “free speech” is used as a substitute for stringent arbitrariness review and for substantive due process protection of property rights and economic interests. Second, it would be open to a future panel to distinguish the Conflict Minerals Case as a case in which the underlying regulation was itself explicitly mandated by Congress, in Dodd-Frank. See Id. at \*1 (citing 15 U.S.C. §§ 78m(p), 78m note (‘Conflict Minerals’)). Indeed Congress itself had already found that the benefits of the regulation -- unquantifiable benefits -- justified the costs. See Id. at \*8. In such a case, arbitrariness review might itself be relaxed or even suspended. (Bracketing questions of constitutional arbitrariness review under due process, such review is extremely deferential as to administrative rulemaking. See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935)).

<sup>237</sup> Scalia, supra note 2, at 372 (“The pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit’s principle of APA hybrid rulemaking so clearly and authoritatively emerged had the effect, if not the purpose, of assuring compliance below while avoiding accountability above.”).

<sup>238</sup> Id. at 373 n.128.

<sup>239</sup> See Frank H. Easterbrook, Ways of Criticizing the Court, 95 HARV. L. REV. 802, 813-831 (1982).

For many decades, the law of standing was built largely on private law foundations.<sup>240</sup> The central idea was that if government agencies intruded on common law rights, those who were subject to that intrusion would have access to the courts, above all in order to require a showing of legislative authorization.<sup>241</sup> In two respects, the private law model had distinctive libertarian features. First, it protected private rights against government intrusion. Second, it did not allow people to have access to court if they did not have such rights and if they sought to promote or to increase government regulation. Under the private law model, for example, consumers and environmental groups would have a great deal of difficulty in qualifying for standing.

The Administrative Procedure Act allows standing for private rightholders, but it does not embrace the private law model; it grants standing to all those who suffer “legal wrong” because of agency action, or who are “adversely affected or aggrieved by agency action within the meaning of a relevant statute.”<sup>242</sup> In the 1970s, the Supreme Court interpreted these provisions expansively, allowing all those with “injury in fact” to have access to court, so long as they were also “arguably within the zone of interests protected or regulated” by the underlying statute.<sup>243</sup> It was clear that the Court meant to broaden, by a large margin, the class of persons and organizations that would be entitled to have access to court, and that those complaining of insufficient regulatory activity would often be entitled to have their say.<sup>244</sup>

In the decades since that time, it is an understatement to say that the Court’s decisions have not followed a clear path.<sup>245</sup> Nor can it be said that a clear path emerges from the decisions of the DC Circuit. But a number of rulings by that court have moved toward reasserting the private law foundations of standing doctrine. In the relevant cases, the court has invoked the injury-in-fact test to deny standing to environmental, labor, and consumer organizations complaining of what they see as insufficient regulation. The resulting pattern is very far from unbroken, but in some important cases, it has an unmistakably libertarian character.

Here is a stylized description of that pattern. If regulated entities complain of agency action, and seek to fend it off, they are generally entitled to bring suit. All of the core Article III requirements are met. They are readily found to show an injury in fact that is likely to be redressed by a decree in their favor. At the same time, the other requirements for standing are

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<sup>240</sup> For a general account, see Cass R. Sunstein, Standing and the Privatization of Public Law, 88 COLUM. L. REV. 1432 (1988).

<sup>241</sup> See *Chicago Junction Case*, 264 U.S. 258, 266-69 (1924).

<sup>242</sup> 5 U.S.C. § 702.

<sup>243</sup> See *Ass’n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152-58 (1970).

<sup>244</sup> See *Id.* at 154 (“Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”).

<sup>245</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Fed. Election Comm’n v. Akins*, 524 U.S. 11 (1998); *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167 (U.S.S.C. 2000); see also Charles A. Wright & Mary Kay Kane, § 14 “Case or Controversy”—Standing to Litigate, 20 FED. PRAC. & PROC. DESKBOOK § 14 (Apr. 2013).

met as well. Regulated entities can generally show that they are “arguably within the zone of interests” protected or regulated by the underlying statute, and also that their interests are not widely generalized.

By contrast, public interest groups sometimes have had a difficult time meeting the relevant requirements. To some extent, this asymmetry is unobjectionable, because it is built into existing doctrine. If a group called Environmental Defenders, with no members in Utah, complains of a development project in Utah, there is no injury in fact, and hence no standing.<sup>246</sup> But the D.C. Circuit has gone well beyond the Supreme Court’s instructions. It has erected barriers where existing law is ambiguous or arguably cuts the other way.

In a large number of cases, the court has permitted expansive standing to regulated entities who sought to challenge federal regulations, even when those challenges were not clearly authorized under existing standing doctrine. For example, it is hardly obvious that private investors have standing to challenge system-level decisions by financial regulators, at least where the effects of those decisions on particular investors are necessary speculative. Nonetheless, the DC Circuit had no difficulty in granting standing.<sup>247</sup> Or consider the question whether a competitor may challenge an agency decision that might impose economic harm. While the Supreme Court has generally been willing to grant standing in such cases,<sup>248</sup> we can readily imagine situations in which the harm might be considered impossibly speculative, and in which it might be objected that competitors are not even arguably within the zone of interests. Nonetheless, the D.C. Circuit has been conspicuously open to such challenges, especially when the defendant is the Environmental Protection Agency. Cases in which the court has granted standing to regulated entities are plentiful, and so far as we have been able to ascertain, the pattern is nearly unbroken.<sup>249</sup>

By contrast, public interest groups have a mixed record. In many cases, public interest groups have been denied standing even when their members made a plausible claim of injury-in-

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<sup>246</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Lujan*, 504 U.S. 555.

<sup>247</sup> *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009) (holding that private investor has standing to challenge Office of Thrift Supervision’s decision, since economic harm was “substantially probable”);

<sup>248</sup> See, e.g., *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388 (1987).

<sup>249</sup> *Honeywell Int’l, Inc. v. E.P.A.*, 705 F.3d 470, 472 (D.C. Cir. 2013) (holding that regulated entity had standing to challenge EPA’s approval of competitors’ allowance transfers); *Holistic Candles & Consumers Ass’n v. Food & Drug Admin.*, 664 F.3d 940, 943 (D.C. Cir. 2012) (holding that regulated entities have standing to challenge FDA actions that would allegedly outlaw manufacture of their products); *Lake Carriers’ Ass’n v. E.P.A.*, 652 F.3d 1, 5 (D.C. Cir. 2011) (holding that trade associations have standing to challenge EPA permit system); *Lichoulas v. F.E.R.C.*, 606 F.3d 769, 774 (D.C. Cir. 2010) (holding that regulated entity has standing to challenge FERC’s termination of license to operate a hydropower project); *Affum v. United States*, 566 F.3d 1150 (D.C. Cir. 2009) (holding that regulated entity had standing to challenge decision of Food and Nutrition Service); *Alvin Lou Media, Inc. v. F.C.C.*, 571 F.3d 1 (D.C. Cir. 2009) (holding that radio-station applicant for license had standing to challenge FCC’s denial of reconsideration of application); *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 6 (D.C. Cir. 2009) (holding that regulated cable companies had standing to challenge FCC rule).

fact. In Vietnam Veterans of Am. v. Shinseki,<sup>250</sup> for example, the court held that a veterans advocacy group lacked standing to challenge Department of Veterans Affairs delays in processing claims for disability benefits. The central conclusion was that a delay in the average time of review could not be counted as an individual injury -- a conclusion that is not directly in conflict with Supreme Court precedent, but that is in some tension with prominent rulings.<sup>251</sup> In Commuter Rail Div. of Reg'l Transp. Auth. v. Surface Transp. Bd.,<sup>252</sup> the court held that Sierra Club lacked standing to challenge the Surface Transportation Board's approval of a merger of railroad companies, notwithstanding a plausible argument that the merger would have harmful environmental consequences. The court found a lack of causation and redressability. In Ass'n of Flight Attendants-CWA, AFL-CIO v. U.S. Dep't of Transp.,<sup>253</sup> the court held that flight-attendant union lacked standing to challenge Department of Transportation's decision to certify Virgin Airlines, finding an absence of causation between that decision and adverse effects on union members. In Young Am.'s Found. v. Gates,<sup>254</sup> the court ruled that an advocacy group lacked standing to challenge Department of Defense's grants to state universities that deny access to military recruiters, concluding that the injury was too speculative. In Defenders of Wildlife v. Perciasepe,<sup>255</sup> the court held that an environmental advocacy group lacked standing to challenge EPA's delays in promulgating revisions to guidelines under Clean Water Act, because it provides "no more than speculation to support its argument." And in Equal Rights Ctr. v. Post Properties,<sup>256</sup> Inc., the court concluded that a fair-housing advocacy group lacked standing to sue for violations of Fair Housing Act, because the facts were insufficient to establish "concrete and particularized" or "actual or imminent" injury.

We do not contend that these decisions are implausible, or that a majority of the Supreme Court would disagree with all or most of them; the Court's decisions leave significant ambiguities and gaps. But it is reasonable to say that almost all of them could have gone the other way. It is well known that whether an injury is "speculative" depends on how it is characterized. If an injury is characterized as an opportunity or a risk, it may well count for purposes of standing even if it would seem implausibly speculative if characterized more narrowly.<sup>257</sup> And in principle, the requirements of causation and redressability are double-edged swords. They might well be used to prevent regulated entities from having access to court, on the

<sup>250</sup> 599 F.3d 654 (D.C. Cir. 2010).

<sup>251</sup> See, e.g., Japan Whaling Ass'n v. Cetacean Society, 478 US 221 (1986).

<sup>252</sup> 608 F.3d 24 (D.C. Cir. 2010).

<sup>253</sup> 564 F.3d 462 (D.C. Cir. 2009).

<sup>254</sup> 573 F.3d 797 (D.C. Cir. 2009).

<sup>255</sup> 714 F.3d 1317 (D.C. Cir. 2013).

<sup>256</sup> 633 F.3d 1136 (D.C. Cir. 2011).

<sup>257</sup> Compare, e.g., Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993) (holding that plaintiff "seeking to challenge [a municipal preferential procurement policy] need not allege that he would have obtained the benefit but for the [law] in order to establish standing" but only to show that the law denied him the ability to compete on an equal footing), with Allen v. Wright, 468 U.S. 737, 755 (1984) (holding that plaintiffs lack standing because they failed to allege an "injury suffered as a direct result of having personally been denied equal treatment").

ground that it is purely speculative whether a judicial ruling -- for example, requiring compliance with some procedural requirement -- will actually redress the alleged injury. But we have been unable to find even a single case in which the court of appeals has used standing doctrine in that way. With respect to standing, administrative law has a clear libertarian dimension in a number of important rulings by the D.C. Circuit.

## F. Reviewability

### 1. When Does “Shall” Mean “Must”?

Even if parties have standing, the APA withholds judicial review when statutes preclude review, or where agency action is “committed to agency discretion by law.”<sup>258</sup> These provisions are not self-interpreting, and the Supreme Court has developed an elaborate body of precedent.<sup>259</sup> The law of reviewability in the D.C. Circuit, however, relates uneasily to that body of precedent, in part because the Circuit’s reviewability decisions sometimes display a distinct libertarian valence. We will examine one particularly telling pair of cases in detail.

It is common ground that in a hierarchical judicial system, lower courts should follow the decisions of higher courts in legally identical cases. The D.C. Circuit has come very close to simply declining to follow controlling Supreme Court precedent on reviewability, in a case from 2013, Cook v. FDA.<sup>260</sup> The case is important not so much for itself, but as evidence of the willingness of some of the Circuit’s most influential judges more or less to ignore the instructions of the Supreme Court by means of irrelevant distinctions. And the libertarian valence of that willingness emerges when we compare Cook with another, strikingly similar case, Sierra Club v. Jackson,<sup>261</sup> from 2011.

Cook involved the reviewability of agency non-enforcement decisions.<sup>262</sup> In 1985, in Heckler v. Chaney,<sup>263</sup> the Court had held such decisions presumptively unreviewable.<sup>264</sup> Chaney arose out of an attempt, by opponents of capital punishment, to obtain judicial review of the FDA’s refusal to begin enforcement proceedings to prevent states from using lethal drugs as a method of execution.<sup>265</sup> The plaintiffs claimed that use of the drugs in capital punishment violated the federal Food, Drugs and Cosmetics Act.<sup>266</sup>

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<sup>258</sup> 5 U.S.C. § 701(a).

<sup>259</sup> See generally CHARLES H. KOCH & RICHARD MURPHY, 4 ADMIN. L. & PRAC. § 12:10-14 (3d ed.).

<sup>260</sup> 733 F.3d 1 (D.C. Cir. 2013).

<sup>261</sup> 648 F.3d 848 (D.C. Cir. 2011).

<sup>262</sup> 733 F.3d at 3.

<sup>263</sup> Heckler v. Chaney, 470 U.S. 821 (1985).

<sup>264</sup> Id. at 831.

<sup>265</sup> Id. at 823.

<sup>266</sup> Id.

The Chaney Court held that agency decisions to enforce, or not, are presumptively “committed to agency discretion by law”<sup>267</sup> within the meaning of §701 of the APA, and thus unreviewable. Although the Court said that the presumption could be overcome by a sufficiently clear statutory command to enforce in a particular class of cases,<sup>268</sup> it found no such command in the Food, Drug and Cosmetics Act.<sup>269</sup> Despite the seemingly mandatory terms of the Act, the Court was very clear about a point that the D.C. Circuit later disregarded: mandatory text need not always be taken at face value in this setting.<sup>270</sup> Rather, even facially mandatory commands take on a special legal meaning when read in light of the need to allocate enforcement resources among the myriad of tasks that agencies face, and in light of the robust quasi-constitutional tradition of executive discretion over enforcement decisions.<sup>271</sup>

Cook presented strikingly similar facts. The main difference was that the case involved foreign commerce rather than domestic commerce; the plaintiffs were challenging the FDA’s decision not to initiate enforcement action against lethal drugs imported from abroad.<sup>272</sup> That distinction is not legally relevant to the reviewability issue, and the obvious resolution would be to apply Chaney and have done with it. The panel -- Judges D.H. Ginsburg, Sentelle, and Rogers -- nonetheless allowed judicial review.<sup>273</sup>

The relevant provisions stated that FDA “shall request” samples of drugs produced at unregistered foreign facilities, and then, “[i]f it appears’ that an article offered for import violates a substantive prohibition of the [Food, Drug and Cosmetics Act], ... ‘such article shall be refused admission.’”<sup>274</sup> A critical provision in Chaney, however, had also used “shall,” yet the Court had held that language insufficient to override the agency’s enforcement discretion.<sup>275</sup> The Court was “unwilling to attribute such a sweeping meaning”<sup>276</sup> to this language, despite its facially mandatory terms. So it was not obvious, at best, how Cook and Chaney could be distinguished.

Judge Ginsburg, writing for the panel in Cook, tried the following tack:

The plaintiffs begin by arguing simply that “the ordinary meaning of ‘shall’ is ‘must.’ ” The case law provides ample support.... Citing Chaney, the FDA objects that ‘in the enforcement context ... [the word ‘shall’] may not be properly read to curtail the agency’s

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<sup>267</sup> Id. at 831.

<sup>268</sup> Id. at 832-34 (distinguishing Dunlop v. Bachowski, 421 U.S. 560 (1975)).

<sup>269</sup> Id. at 835-37.

<sup>270</sup> See id. at 835 (construing statutory requirement that violators “shall be imprisoned ... or fined” as a permissive grant of authority to the agency, not a mandatory requirement to prosecute).

<sup>271</sup> See id. at 831-32.

<sup>272</sup> See Cook, 733 F.3d at 4 (the drugs in question were imported from the UK).

<sup>273</sup> Id. at 10.

<sup>274</sup> Id. at 3 (quoting 21 U.S.C. § 381(a)).

<sup>275</sup> 470 U.S. at 835.

<sup>276</sup> Id.



discretion.’ In Chaney, however, the word ‘shall’ appeared in the consequent of a section providing for criminal sanctions: A violator ‘shall be imprisoned ... or fined.’ 470 U.S. at 835, 105 S.Ct. 1649 (quoting 21 U.S.C. § 333). The criminal statute in Chaney did not use “shall” in connection with the antecedent condition of prosecution.... The ‘enforcement’ discretion held unreviewable in Chaney, therefore, was whether to recommend prosecution [to the Attorney General]. Here, by contrast, the word “shall” appears in both an antecedent (“shall request ...samples”) and the consequent (“shall be refused admission”).<sup>277</sup>

In the abstract, the distinction makes sense, but it is unconvincing in the context at hand. The panel writes as though the antecedent of “shall be refused admission” is “shall request samples.” It is not. (Actually, the panel writes “an antecedent,”<sup>278</sup> a misleading formulation made necessary by the unfortunate fact that the request procedure comes well before the sanction of refusing admission, in the statutory sequence.) What the provision does say is that “if it appears that from the examination of such samples or otherwise that ... such article is adulterated, misbranded, or [an unapproved new drug] ..., then such article shall be refused admission.”<sup>279</sup> FDA argued straightforwardly that the antecedent in this provision, phrased in conditional rather than mandatory terms, allowed FDA conventional regulatory discretion to decide whether the statutory criteria were met, and thus whether to trigger the sanctions in the consequent.<sup>280</sup>

Nothing in Chaney suggests that the agency’s discretion would be displaced by such a provision. There is also an undeveloped implication in Judge Ginsburg’s discussion that enforcement discretion is less subject to statutory override where criminal sanctions rather than merely (civil) regulatory sanctions are at issue.<sup>281</sup> But the implication is left undeveloped because it would be extremely dubious, or even indefensible, as a general proposition. Certainly Chaney drew no such distinction; it lumped together regulatory and criminal sanctions under the rubric of “enforcement actions”<sup>282</sup> and held that the agency enjoyed unreviewable discretion over all of these.

But bracket all of these issues. The larger point of Chaney, which the panel ignored, is that in the context of statutory sanctions, whatever their nature, a congressional specification that the sanction “shall be X” is simply not enough to obligate the relevant enforcer to impose the sanctions (or to recommend that another agency impose the sanctions) at every possible

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<sup>277</sup> Cook, 733 F.3d at 7-8 (emphasis added).

<sup>278</sup> Id. at 8.

<sup>279</sup> 21 U.S.C. § 831(a) (emphasis added).

<sup>280</sup> See Cook, 733 F.3d at 8-9.

<sup>281</sup> See Id. at 8 (“The ‘enforcement’ discretion held unreviewable in Chaney, therefore, was whether to recommend prosecution. Here, by contrast, the word ‘shall’ appears in both an antecedent (‘shall request ... samples’) and the consequent (‘shall be refused admission’).”) (citations omitted).

<sup>282</sup> See, e.g., Chaney, 470 U.S. at 824 (listing “various investigatory and enforcement actions” at issue, most of which were regulatory rather than criminal).

opportunity. The Chaney Court held that to override the executive's retained enforcement discretion, Congress must do more than merely specify sanctions; it must clearly and specifically remove the agency's retained discretion over the determination whether to trigger the sanctions, and there is no such clear statement in Cook.<sup>283</sup> There is a hint, in the Cook discussion, that the panel meant to distinguish discretion over whether to enforce from the mode of enforcement.<sup>284</sup> But the Chaney Court said expressly that despite the mandatory language, the FDA's discretion extended to both the question whether to enforce and the question how to enforce.<sup>285</sup> In effect, the Cook panel refused to acknowledge that in an enforcement context, according to the Court in Chaney, it is just not true that "shall" ordinarily means "must."<sup>286</sup> Whatever the literal meaning of "shall," its legal meaning, in a complex regulatory scheme, is affected by the institutional context.

The troubling thing is not so much the decision itself, which rests on somewhat peculiar facts unlikely to be frequently at issue. The troubling thing is the court's attitude towards controlling precedent from a hierarchical superior, squarely on point. The panel appears to see that precedent as something to be brushed aside with a misleading distinction rather than a binding command to be internalized and obeyed. And the attitude of casual disregard that underpins Cook is not neutral. In its substantive aspect, the decision is classically libertarian; opposition to the death penalty is a cause upon which many libertarians of left and right converge.<sup>287</sup> (Here there is a clear split between law-and-order conservatives, on the one hand, and conservative libertarians on the other. Edward Crane, founder of the Cato Institute, professes the following view on capital punishment: "it is morally justified but ... the government is often so inept and corrupt that innocent people might die as a result. Thus, I personally oppose capital

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<sup>283</sup> See Id. at 832-33 ("[an enforcement] decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. . . . Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

<sup>284</sup> Cook, 733 F.3d at 8-9 (The statute allows the FDA "FDA enforcement discretion in other respects." For example, "the FDA may detect a violation through a method other than 'examination,' such as electronic screening of entry data that importers submit to Customs.").

<sup>285</sup> Chaney, 470 U.S. at 831 ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.")

<sup>286</sup> Id. at 835 (the statutory language of "shall"—in the context of "shall be liable to be proceeded against" and "shall be imprisoned ... or fined" is "permissive"—"commit[s] complete discretion to the Secretary to decide how and when they should be exercised.").

<sup>287</sup> See, e.g., Ben Jones, The Libertarian Case Against the Death Penalty, LIBERTARIANISM.ORG (Oct. 24, 2013), <http://www.libertarianism.org/columns/libertarian-case-against-death-penalty>; Zenon Evans, Ron Paul Endorses Anti-Death Penalty Group, REASON.COM (Aug. 7, 2013), <http://reason.com/blog/2013/08/07/ron-paul-just-endorsed-anti-death-penalt>. But see Murray N. Rothbard, The Libertarian Position on Capital Punishment, MISES INSTITUTE (July 13, 2010), <http://mises.org/daily/4468> ("we advocate capital punishment for all cases of murder, except in those cases where the victim has left a will instructing his heirs and assigns not to levy the death penalty on any possible murder").

punishment.”<sup>288</sup>) In that sense, Cook has a particular, libertarian valence. But the possible valences of reviewability law only become fully apparent when we bring in another case.

## 2. When “Shall” Does Mean “May,” After All?

Now imagine a case involving precisely the same legal issue: whether mandatory statutory language, stating that the agency “shall” take enforcement action, suffices to overcome the Chaney presumption against unreviewability of agency decisions not to enforce. Suppose also, however, that the relevant agency refusal to enforce involved an agency declining to enforce environmental laws against a regulated industrial entity, so that the libertarian instinct would now pull in favor of the Chaney presumption and against reviewability. A consistently textualist judge would decide the two cases consistently, all else equal, depending upon the details of the statutory scheme. But a consistently libertarian judge would be inclined to treat the two cases differently, finding that the presumption of unreviewability was not overcome in the case of environmental enforcement, even though it had been in Cook.

*Et voila*: Sierra Club v. Jackson,<sup>289</sup> decided in 2011. The panel -- Judges Brown, Ginsburg and Sentelle, three of the main proponents of libertarian administrative law -- held that the Sierra Club could not obtain judicial review<sup>290</sup> of the EPA Administrator’s refusal to initiate action to prevent the construction of three major pollution-emitting facilities in a Clean Air Act attainment area.<sup>291</sup> In such areas, the statute creates a permitting scheme in order to prevent significant deterioration of air quality.<sup>292</sup> The critical statutory provision, titled “Enforcement,” states as follows:

“[t]he Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility ... proposed to be constructed” in an attainment area.<sup>293</sup>

The underlined language cuts more strongly in favor of overcoming the presumption of unreviewability than does the language in Cook. The quoted provision not only says that the agency “shall” enforce, but also says, in pointed contrast, that states “may” enforce, suggesting by negative implication that the former was deliberately chosen to be a mandatory command. And the provision, read in the ordinary way, extends the range of possible “measures” only to

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<sup>288</sup> LINCOLN JOURNAL STAR, Editorial, 4/22: Conservatives and death penalty (Apr. 21, 2013), available at [http://journalstar.com/news/opinion/editorial/editorial-conservatives-and-death-penalty/article\\_b92acc65-a01a-5d6c-9a53-563d708b21be.html](http://journalstar.com/news/opinion/editorial/editorial-conservatives-and-death-penalty/article_b92acc65-a01a-5d6c-9a53-563d708b21be.html).

<sup>289</sup> 648 F.3d 848 (D.C. Cir. 2011).

<sup>290</sup> See *Id.* at 856-57.

<sup>291</sup> See *Id.* at 851-52.

<sup>292</sup> See *Id.* at 852.

<sup>293</sup> 42 U.S.C. § 7477.

encompass those measures necessary to prevent construction of the major emitting facility. It gives the Administrator no discretion over whether to take steps to prevent construction in the first place; the obvious point is that the Administrator must do so.

The panel, however, held that the presumption of unreviewability was not overcome, allowing the major polluting facilities to be built unchallenged. Decisive here, the panel said, was the larger “context and structure” of the statute:

Congress's mandate to the Administrator is that she shall "take such measures, including issuance of an order, or seeking injunctive relief, as necessary...." There is no guidance to the Administrator or to a reviewing court as to what action is "necessary." Granted, the statute further says, "as necessary to prevent the construction or modification of a major emitting facility ... proposed to be constructed" in an attainment area, but that nonetheless leaves it to the Administrator's discretion to determine what action is "necessary." [Here, the Administrator] has apparently made the decision that no action is necessary.<sup>294</sup>

The literalistic textualism of Cook, in which the panel insists that “shall” means “shall,” here finds its Carroll-esque counterpoint: a statute commanding that the agency “shall” take action as “necessary to prevent the construction of” a major polluting facility apparently allows the agency to opt for no action at all.

Sierra Club v. Jackson and Cook may be consistent from a libertarian standpoint, but they are legally irreconcilable. This is not to say which decision is correct, which incorrect. It is even possible that both are wrong. More plausible than the actual panel outcomes would have been the opposite pair of holdings: that the presumption of unreviewability was overcome in Sierra Club v. Jackson, but not overcome in Cook. Whatever the legal merits, however, the larger point is clear. Recent reviewability cases, decided by judges in the core libertarian cadre on the Circuit, have an unmistakable libertarian valence.<sup>295</sup>

### III. Overview

#### A. Libertarianism, Progressivism, and Administrative Law

As it now stands, there is a sense in which administrative law does have libertarian features, certainly insofar as it enables regulated entities to challenge the legality of agency action. If an agency has invaded the private sphere, those who have been injured are allowed to

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<sup>294</sup> Sierra Club, 852 F.3d at 856.

<sup>295</sup> For other recent examples, see, e.g., Association of Irrigated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007) (per Sentelle, J. with Rogers, J., dissenting) (community and environmental groups denied review of EPA agreements with non-compliant animal feeding operations); Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011) (en banc) (finding reviewability because IRS notice was a substantive rule that constrained its own discretion).

test the question of legality. But under appropriate circumstances, parties may also challenge agency refusal to regulate others,<sup>296</sup> or challenge agency decisions to deregulate.<sup>297</sup> Review of agency action for conformity to organic statutes, for procedural regularity, and for arbitrariness or substantial evidence is available, and occurs in the same fashion, in all these different contexts.<sup>298</sup> And it is clear that when agency action is authorized by law, and consistent with procedural requirements, it must be upheld even if it runs afoul of libertarian strictures (at least if there is no constitutional objection).

The consequence is that the APA, and surrounding doctrines, cannot be counted as libertarian in any general or systematic way. To be sure, we could imagine a statute that would squarely fall in the libertarian camp, perhaps protecting property rights by requiring compensation for certain types of regulatory action, perhaps by imposing novel burdens of justification for intrusions on private rights. But the APA is not that statute, and the Supreme Court has not read it as if it were. It is true that some doctrines at the intersection of constitutional law and administrative law -- including the commercial speech doctrine - have a distinctive libertarian flavor. But there is a significant difference between the commercial speech doctrine as it now stands and the commercial speech doctrine as the D.C. Circuit has started to understand it. It is also true that the Supreme Court has sometimes deployed arbitrariness review in a fairly aggressive way,<sup>299</sup> and no one would be shocked if it did so in the future. But as the law now stands, arbitrariness review, as undertaken by the Court, does not have any kind of libertarian tilt.<sup>300</sup>

Nor is administrative law generally and systematically progressive, or pro-regulatory, or anything else -- though here as well, we could imagine a statute, or a set of implementing doctrines, that tilted in that direction. As the Supreme Court understands it, administrative law, as law, has no systematic and general valence that can be explained in the terms of any identifiable political theory or any single theory of regulation. In that modest sense, it is a genuinely (although only partly) autonomous body of rules, standards, and principles -- autonomous in the sense that it has not been systematically captured by any one political or ideological approach (except insofar as such an approach prizes legality, procedural safeguards, and checks on arbitrariness), and thus cannot be neatly characterized in libertarian or nonlibertarian terms. The basic error of the recent D.C. Circuit decisions is to attempt to engraft, to a greater or lesser degree, a particular controversial theory -- a libertarian theory of the legitimate role of the state, itself rooted in a particular controversial interpretation of public-choice economics -- onto legal materials that have remained recalcitrant.

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<sup>296</sup> *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975).

<sup>297</sup> *State Farm*, 463 U.S. 29 (1983).

<sup>298</sup> *Id.*

<sup>299</sup> *See Id.*

<sup>300</sup> On the contrary, the leading case struck down an effort at deregulation. *See Id.*

We do not deny that a hypothetical Supreme Court could move in the direction of embracing such a theory. But the existing materials strongly resist the imposition of any particular, controversial political vision (whether progressive, as in the 1970s, or libertarian), and the reason is simple: American administrative law is fundamentally a compromise. The APA itself reflects a compromise between the New Dealers, enthusiastic about the emergence of new regulatory institutions, and New Deal critics, seeking to strengthen procedural and judicial checks on those institutions.<sup>301</sup> Recall the very first sentence of Vermont Yankee:

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," Wong Yang Sung v. McGrath, 339 U. S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." Id., at 40.<sup>302</sup>

Here Vermont Yankee's author, then-Justice Rehnquist, pays tribute to the Justice for whom he clerked, Robert Jackson, the author of Wong Yang Sung. The vision underpinning both cases is that the Administrative Procedure Act should be treated as an organizing charter for the administrative state -- a super-statute, if you will<sup>303</sup> -- not because it is a grand statement of principles with a specific ideological valence, but precisely because it is a compromise document. The political, social, and economic forces that swirl around the administrative state -- not only the APA but also the legalism of the organized bar; technocratic and economic approaches to regulatory policymaking; and demands for democratic oversight by elected officials and for democratic participation by affected groups and citizens -- have produced a set of rules that in effect reconcile and calibrate the cross-cutting considerations. It is inconsistent with that basic settlement to select one of the APA's multiple commitments and elevate it into the master principle that should animate administrative law or some of its central doctrines.

In the 1960s and 1970s, however, a cadre of lower court judges did just that. Those judges built up a body of administrative law principles that had a distinctive political "tilt," in the sense that they operated, apparently by design, to counteract what they saw as anti-regulatory pressures within the federal bureaucracy. Recall these remarkable words: "Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.' But it remains to be seen whether the promise of this

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<sup>301</sup> See generally Nathaniel L. Nathanson, Some Comments on the Administrative Procedure Act, 41 ILL. L. REV. 368 (1946); see Id. at 391 ("the compromises worked out in the drafting of the Act between advocates of uniformity in administrative procedure and the defenders of diversity and flexibility, did not always result in a product that is crystal clear").

<sup>302</sup> Vermont Yankee, 435 U.S. at 523.

<sup>303</sup> Scalia, supra note 2, at 363, 406; Adrian Vermeule, Superstatutes, THE NEW REPUBLIC (Oct. 26, 2010), available at <http://www.newrepublic.com/book/review/superstatutes>; Kathryn Kovacs, Superstatute Theory and Administrative Common Law, 90 IND. L.J. \_\_ (forthcoming 2014).

legislation will become a reality. Therein lies the judicial role.”<sup>304</sup> In the end, the Supreme Court was not enthusiastic about this conception of the judicial role, or about the idea that judges should oppose themselves to “the destructive engine of material ‘progress’” (with the last word in scare quotes).

We have attempted to show that a number of decisions of the DC Circuit reflect a mirror-image of the previous approach -- a form of libertarian administrative law. We can find that mirror-image in distinctive receptivity to (sometimes plausible) objections from regulated entities, and in far less receptivity to (also plausible) objections from public interest groups. We can also find it in a series of doctrines that erect special barriers to regulatory activity -- barriers that might make sense from the best account of political economy, but that cannot claim firm roots in the existing legal materials, and that in some cases affirmatively contradict those materials, as we have tried to show.

The contradiction is not accidental or contingent. It will inevitably occur when a judicial panel treats administrative law as though it embodies a controversial and politicized account of its function -- the protection of property from interest-group pillage, spurring progressive regulation in the face of interest-group resistance, or any similar high-level concern. Because administrative law is “a formula upon which opposing political and social forces have come to rest,”<sup>305</sup> it embraces no such account, and it is a form of infidelity (not “integrity”<sup>306</sup>) to treat it as though there is. Put in Dworkinian terms,<sup>307</sup> no master principle will “fit” the legal materials of administrative law without serious distortion.

To be sure, the rules of administrative law contain a high degree of open texture and flexibility. But only within bounds; and libertarian administrative law, like progressive administrative law before it, cannot help but transgress those bounds. Just as the progressive judges of the 1970s crossed a line by inventing a form of “hybrid rulemaking” that directly contradicted the APA’s two-tier procedural structure of formal and informal rulemaking, so the libertarian judges of today have crossed a similar line -- perhaps most flagrantly by inventing the doctrine that agencies are required (in some cases at least) to use notice-and-comment rulemaking to change an interpretive rule. The lines of compromise in the APA will not accept any such mandate, nor the vision that animates it.

## B. Possible Futures

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<sup>304</sup> *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

<sup>305</sup> *Vermont Yankee*, 435 U.S. at 523.

<sup>306</sup> See RONALD DWORKIN, *LAW'S EMPIRE* ch. 6-7 (1986).

<sup>307</sup> See *Id.*

A different question is whether administrative law might become increasingly libertarian. The freedom-related and public-choice concerns that account for libertarian administrative law are best understood as proposals for a large-scale change of the legal regime, rather than legal arguments within the current regime, as we attempted to document earlier. With imaginable developments over time, especially on the Supreme Court itself, movements in libertarian directions could certainly occur. With respect to the law of standing, for example, the doctrine could easily move in more or less libertarian directions, as it has in the past.<sup>308</sup> Revival of the nondelegation doctrine seems highly unlikely, but in an extreme case, it is not out of the question. (The Court has granted certiorari on the Amtrak nondelegation decision,<sup>309</sup> so some answers are not far off.)

Likewise, the Court could well fortify the protection accorded to commercial advertising. The graphic warnings decision is, in our view, a large step beyond existing doctrine, but no one would be stunned if five justices were willing to take that step. Strengthened arbitrariness review, designed to protect those subject to regulation, seems out of keeping with the Court's instructions,<sup>310</sup> and even with prominent decisions on the DC Circuit itself.<sup>311</sup> But we cannot rule out the possibility that the Court itself would take a hard line against regulations from the SEC, perhaps with the assistance of arbitrariness review.<sup>312</sup>

There is a recent constitutional analogy. For a long period, it seemed as if the Court would defer to essentially any decision of Congress under the Commerce Clause.<sup>313</sup> Some people, interested in the Lost Constitution, deplored the Court's posture of deference.<sup>314</sup> Whether or not they believed that the Constitution had been "lost," a majority of the Court initiated some steps in the direction of reasserting what it saw as genuine constitutional limitations.<sup>315</sup> Those who approved of those steps hoped that large-scale constitutional change was underway.<sup>316</sup>

Their hopes have not been realized, but in the setting of constitutional debates over the Affordable Care Act, the novel arguments advanced to show that Congress lacked power to regulate "inaction" were not (in our view) best understood as arguments within the regime of constitutional law that has prevailed since the New Deal. Rather they were an effort to strike a

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<sup>308</sup> See supra Part 2.E.

<sup>309</sup> Ass'n of Am. Railroads v. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013), cert. granted, 82 U.S.L.W. 3533 (U.S. June 23, 2014) (No. 13-1080); see supra text accompanying note 91.

<sup>310</sup> See, e.g., EPA v. EME Homer City Generation, No. 12-1182, 572 U.S. \_\_, slip op. at 28-31 (Apr. 29, 2014).

<sup>311</sup> See, e.g., Center for Biological Diversity v. EPA, No. 12-1238, 2014 WL 2178785, \_\_ F.3d \_\_ (D.C. Cir. May 27, 2014), at \*6-9.

<sup>312</sup> The Supreme Court recently unanimously rejected the SEC's position regarding the statute of limitations for bringing enforcement actions. Gabelli v. SEC, 133 S. Ct. 1216 (2013).

<sup>313</sup> See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942).

<sup>314</sup> See, e.g., Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387 (1987).

<sup>315</sup> See United States v. Morrison, 529 U.S. 598 (2000) (invalidating private right of action under the Violence Against Women Act).

<sup>316</sup> See, e.g., BARNETT, supra note 20.



blow at the regime itself, with a view to (partially) returning to the Lost Constitution. The approach won five votes in *NFIB v. Sebelius*,<sup>317</sup> but not a full victory, because of the presence of an alternative holding (upholding the statute as an exercise of the taxing power),<sup>318</sup> which will allow some future Court to describe the commerce holding<sup>319</sup> as unnecessary to the decision, should it choose to do so.

As things now stand, it is unlikely that libertarian administrative law will win even so qualified a victory, certainly in the short-run. One reason is political. The environment in which libertarian administrative law evolved was one in which the D.C. Circuit was short of its full complement of judges for years,<sup>320</sup> because Republicans in the Senate blocked new appointments to the Court.<sup>321</sup> The result was a partisan split of active judges within the Circuit, a split that tilted in a heavily Republican direction for some time.<sup>322</sup> More recently, however, the Senate filibuster rules have been modified to allow judicial appointments by a simple majority,<sup>323</sup> and President Obama has appointed a clutch of new judges to the Circuit.<sup>324</sup> To be sure, libertarian administrative law does not perfectly track party lines, especially because many Republican appointees have no enthusiasm for it. But there is a powerful correlation, and it seems likely that the growth phase of libertarian administrative law is over, at least for the short-term. Perhaps the precedents will remain as they are, but perhaps they will be narrowly cabined. With the possible exception of protection of commercial advertising, we do not expect significant new developments in the directions we have traced. It is imaginable, of course, that a Republican president, elected in 2016, could appoint judges with great enthusiasm for libertarian administrative law, which would make such developments more likely. But for the immediate future, a significant question is whether, and how swiftly, libertarian administrative law will be stopped or undone.

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<sup>317</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>318</sup> *See id.* at 2594-95.

<sup>319</sup> *See id.* at 2585-93.

<sup>320</sup> For example, of the three judges that President Obama appointed in 2013, Judge Millett's current seat had been vacant from 2005-2013, Judge Srinivasan's seat from 2008-2013, and Judge Pillard's seat from 2011-2013.

<sup>321</sup> For an example of the press coverage on Republicans filibustering President Obama's nominees, see Burgess Everett, *Republicans block third judicial appointee*, POLITICO (Nov. 18, 2013), <http://www.politico.com/story/2013/11/robert-wilkins-republicans-block-judge-100021.html>.

<sup>322</sup> From the time Judge Williams took senior status in 2001 until now-Chief Justice Roberts was appointed to the D.C. Circuit in 2003, the D.C. Circuit was evenly split between four judges appointed by Democratic presidents (Judges Edwards, Garland, Rogers, and Tatel) and four judges appointed by Republican presidents (Judges Ginsburg, Sentelle, Randolph, and Henderson). From 2006 to 2008, there were ten active judges on the Circuit. Three (Judges Garland, Rogers, and Tatel) were appointed by Democratic President Bill Clinton, and the remaining seven (Judges Ginsburg, Sentelle, Randolph, Henderson, Brown, Griffith, and Kavanaugh) by Republican presidents. Aside from Judge Randolph taking senior status in 2009, the composition of the D.C. Circuit remained constant from 2008 until President Obama made his first appointments in 2013.

<sup>323</sup> *See* Janet Hook & Kristina Peterson, *Democrats Rein In Senate Filibusters*, WALL STREET J. (NOV. 21, 2013), <http://online.wsj.com/news/articles/SB10001424052702304607104579211881413579404>.

<sup>324</sup> Since the change in the filibuster rule, the Senate has confirmed three new nominees by President Obama: Judges Millett, Pillard, and Wilkins.

In our view, it is not enough for libertarian administrative law not to grow, or even to be scaled back. It should also be repudiated in principle, and all its works overthrown. A Vermont Yankee II<sup>325</sup> is called for to inscribe into the law the principle that no abstract political theory, whatever its valence, may be elevated into a master-principle of administrative law. Administrative law enjoys a partial autonomy from both quotidian politics and political theories, in the modest but important sense that no political view or theory can properly claim to have captured the whole terrain or to describe all the rules. As Justice Rehnquist underscored in Vermont Yankee itself, the master meta-principle of administrative law is that it just has no single theoretical master-principle, at least not with any kind of ideological valence. And as he explained, “The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action.”<sup>326</sup> In an appropriate case, the Court should declare authoritatively, for a new generation of judges, that the libertarian approach, no less than the progressive approach that preceded it, defies the basic commitments of American administrative law.

We have noted that the time is right. The Court’s grants of certiorari in two of the areas on which we have focused – involving both the Amtrak nondelegation case and the Mortgage Bankers decision about interpretive rules -- would provide the occasion within the compass of a single Term to make the basic point unmistakably clear: Administrative law does create a series of safeguards against unlawful or arbitrary action, but it is not systematically libertarian, and judges have no authority to depart from existing principles, or to make up new doctrines, to push it in that direction.

## Conclusion

In the last decades, an extraordinary amount of academic energy has been devoted to the idea that the Constitution is in some sense “lost” or “in exile,” and that large-scale doctrinal change is necessary in order to assure its restoration. This idea can be found in academic efforts to transform contemporary understanding of the Commerce Clause, the Necessary and Proper Clause, the Contracts Clause, and the Takings Clause (among others). There is no question that the academics who endorse this idea believe that the Constitution has a distinctive libertarian valence, sometimes captured with the phrase “classical liberalism.”<sup>327</sup>

Our goal here has been to show that a number of doctrines on the D.C. Circuit reflect the birth of libertarian administrative law, operating as a kind of substitute or the second-best for the broader project, with which some of the relevant judges have evident sympathy. We have little doubt that a statistical analysis of voting behavior would support this conclusion, with

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<sup>325</sup> See Verkuil, supra note 16; Pierce, supra note 16; Lawson & Beermann, supra note 16.

<sup>326</sup> 435 U.S. at 559.

<sup>327</sup> EPSTEIN, supra note 19.

predictable variations across judges. But our approach here has been from an internal point of view. We have identified a series of doctrines and decisions -- some high-profile, some relatively obscure -- that are, at least in the aggregate, best understood in libertarian terms. Our suggestion is not that the court has invariably or systematically imposed a libertarian overlay onto the doctrinal materials; case law does not work that way. Nonetheless, the general tendency is clear. Some of the resulting doctrines, involving the nondelegation doctrine, commercial advertising, and standing, reflect the distinctive kinds of constitutional questions that are an organizing part of administrative law. Others purport to be interpretations of the APA itself. Whatever the legal source, the movement toward libertarian principles and outcomes is unmistakable.

It is no news to say that in the 1970s, the DC Circuit developed a form of progressive administrative law, with an identifiable political tilt. Though the tilt was on the surface of some of the key opinions, it was generally more subtle, camouflaged in decisions that leaned on a tendentious reading of the organic statute, that imposed new procedural requirements, or that found agency decisions to be arbitrary when reasonable people could differ. At the time, it was not so easy to step back from the details to see the general pattern, though it is evident in retrospect. We have attempted to show that something similar is happening today.

Our principal goal has been descriptive rather than normative. It remains possible to celebrate one or more of the doctrinal developments that we have explored, or even to say that an accelerated movement in libertarian directions would be desirable. As in the 1970s, however, we believe that the underlying developments are at best in serious tension with both the underlying sources of law and the governing decisions of the Supreme Court. A dose of legal realism, acknowledging the presence and even the inevitability of the occasional “tilt,” has its place, but in a hierarchical court system, respect for the governing rules is not optional.